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Time and Punishment

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The predominant mode of punishment in modern times is the temporal term of imprisonment. Such punishment is divisible in the sense that a constituent part of a sentence of a temporal term of imprisonment also constitutes punishment. Since all punishment requires justification, constituent parts of temporal terms of imprisonment require justification. The measure by which retributivism, currently considered the leading theory of punishment, justifies punishment—desert and proportionality—is only suited to justify whole punishments. If the proportional and deserved punishment for an offender’s crime is (no less than) X time in prison, then a punishment of part of X will necessarily be disproportional, undeserved, and unjustified. Since a whole temporal term of imprisonment cannot be inflicted without first inflicting a part of that whole punishment, retributivism’s inability to justify a part of a temporal term of imprisonment precludes retributivism from justifying a whole temporal term of imprisonment as well. The consensus approach of sentencing underlying state and federal sentencing guidelines and codes as well as the proposed revised Model Penal Code Sentencing provisions, combining both retributivist and consequentialist principles, is also demonstrated to share this difficulty. As a result, this Article advances the novel argument that neither the leading theoretical account of punishment nor the consensus approach of sentencing is able to justify any temporal term of imprisonment for any offender.

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I. INTRODUCTION

The implicit and unanalyzed assumption pervading punishment theory is that if inflicting a sentence of punishment is justified, then inflicting a constituent part of that punishment must also be justified. But under retributivism,¹ which justifies only punishments that are deserved and

¹ While there are varying accounts, retributivism most simply is a theory that justifies punishment not because of its good consequences, but solely "because people deserve it." Kent Greenawalt, *Punishment*, 74 J. CRIM. L. & CRIMINOLOGY 343, 347 (1983). Joel Feinberg furnishes the following concise account of retributivism:

Punishment is justified only on the ground that wrongdoing merits punishment. It is morally fitting that a person who does wrong should suffer in proportion to his wrongdoing. That a criminal should be punished follows from his guilt, and the severity of the appropriate punishment depends on the depravity of the act. The state of affairs where a wrongdoer suffers punishment is morally better than one where he does not, and is so irrespective of consequences.

Joel Feinberg, *Punishment*, in PHILOSOPHY OF LAW 514, 515 (Joel Feinberg & Hyman Gross eds., 2d ed. 1980). For a similar account, see John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 5 (1955). Michael Moore emphasizes that "[t]he distinctive aspect of

proportional to the crime,² this assumption will be shown to be false. As a result, retributivism, currently considered the leading theory of punishment,³ may be foreclosed from justifying the predominant mode of punishment in modern times—temporal terms of imprisonment.⁴

retributivism is that the moral desert of an offender is a *sufficient* reason to punish him or her . . .” MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 88 (1997). For other accounts of retributivism, see G.W.F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* § 101 at 129 (Allen W. Wood ed., H.B. Nisbet trans., Cambridge Univ. Press 1991) (1821) (describing retributive punishment as “the crime turned round against itself”); OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 42 (Dover Publications 1991) (1881) (explaining that retributivism “is the notion that there is a mystic bond between wrong and punishment”); IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 140 (Mary Gregor trans., Cambridge Univ. Press 1991) (1797) (requiring that punishment “must always be inflicted upon [an offender] only *because he has committed a crime*”).

² See, e.g., *Tison v. Arizona*, 481 U.S. 137, 149 (1987) (“The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.”); IGOR PRIMORATZ, *JUSTIFYING LEGAL PUNISHMENT* 12 (1989) (listing the principle that “[p]unishment ought to be *proportionate* to the offense” as one of the five fundamental tenets of retributivism); Stanley I. Benn, *Punishment*, in 7 *THE ENCYCLOPEDIA OF PHILOSOPHY* 29, 32 (Paul Edwards ed. 1967, reprint ed. 1972) (noting that retributivism “insists that the punishment must fit the crime”); Feinberg, *supra* note 1, at 516 (“The proper amount of punishment to be inflicted upon the morally guilty offender is that amount which fits, matches or is proportionate to the moral gravity of the offense.”); Greenawalt, *supra* note 1, at 347–48 (observing that for retributivism, “the severity of punishment should be proportional to the degree of wrongdoing”).

³ David Dolinko, *Three Mistakes of Retributivism*, 39 *UCLA L. REV.* 1623, 1623 (1992) (“It is widely acknowledged that retributivism . . . can fairly be regarded . . . as the leading philosophical justification for the institution of criminal punishment.”); *Developments in the Law—Alternative Punishments: Resistance and Inroads*, 111 *HARV. L. REV.* 1967, 1970 (1998) (explaining that “a ‘just deserts’ philosophy associated with retributivism has claimed the mantle of penological predominance”). See Sanford Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 *CAL. L. REV.* 943, 978–81 (1999) (charting retributivism’s rise). But see Kyron Huigens, *The Dead End of Deterrence, and Beyond*, 41 *WM. & MARY L. REV.* 943, 955 (2000) (maintaining that consequentialism “is probably dominant over retributivism in criminal law scholarship”).

⁴ See, e.g., LOIS G. FORER, *A RAGE TO PUNISH: THE UNINTENDED CONSEQUENCES OF MANDATORY SENTENCING* 71 (1994) (“With the exception of capital punishment, all penalties for [serious] violations of law in the United States are framed as amounts of time to be spent in prison.”); NORVAL MORRIS, *MADNESS AND THE CRIMINAL LAW* 150 (1982) [hereinafter, MORRIS, *CRIMINAL LAW*] (noting that “imprisonment . . . is, in practice, the contemporary residual punishment”); *Developments in the Law—The Law of Prisons*, 115 *HARV. L. REV.* 1838, 1841 (2002) (“Today, prisons are the primary means of dispensing punishment for serious crimes, and their use is accelerating.”); cf. Norval Morris & David J. Rothman, *Introduction* to *THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY* vii, vii (Norval Morris & David J. Rothman eds., 1998) (“Meting out punishment by a calculus of time to be served seems so commonsensical today, that it becomes difficult to conceive of a moment when prisons

Temporal terms of imprisonment are divisible in the sense that constituent parts of such punishments also constitute punishment.⁵ For example, a sentence of twenty-years imprisonment contains parts—imprisonment for one month, one year, five years, fifteen years, etc.—that each constitute punishment. Since inflicting punishment requires justification,⁶ and parts of temporal terms of imprisonment constitute punishment, then inflicting constituent parts of temporal terms of imprisonment also require justification.

Whether a constituent part of a temporal term of imprisonment can be justified is an important inquiry. A whole temporal term of imprisonment cannot be inflicted without first inflicting a part of that temporal term of imprisonment. For example, the punishment of twenty-years imprisonment cannot be inflicted without first inflicting one-month, one-year, five-years, ten-years, etc. imprisonment. Inflicting constituent parts of a whole punishment is a necessary condition for inflicting the whole punishment. Therefore, if infliction of a constituent part of a temporal term of imprisonment cannot be justified, then infliction of the whole temporal term of imprisonment cannot be justified.

To begin to appreciate retributivism's difficulty with justifying temporal terms of imprisonment, consider the following illustration. Suppose that an offender is convicted of a serious crime in a jurisdiction that has adopted a retributivist punishment scheme⁷ and receives a sentence of no less than

were not at the core of criminal justice.”).

⁵ The following five elements comprise perhaps the most influential conceptual definition of punishment:

- (i) It must involve pain or other consequences normally considered unpleasant.
- (ii) It must be for an offence against legal rules.
- (iii) It must be for an actual or supposed offender for his [or her] offence.
- (iv) It must be intentionally administered by human beings other than the offender.
- (v) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.

H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 4-5 (Oxford Univ. Press 1968). For other notable definitions of punishment, see Antony Flew, *The Justification of Punishment*, in THE PHILOSOPHY OF PUNISHMENT: A COLLECTION OF PAPERS 83, 85-87 (H.B. Acton ed., 1973); Kent Greenawalt, *Punishment*, in 4 ENCYCLOPEDIA OF CRIME AND JUSTICE 1336, 1336-41 (Sanford Kadish ed., 1983).

⁶ E.g., R.A. DUFF, TRIALS AND PUNISHMENTS 1 (1986) (“It is agreed that a system of criminal punishment stands in need of some strenuous and persuasive justification . . .”); Richard Wasserstrom, *Why Punish the Guilty?*, 20 PRINCETON UNIV. MAG. 14 (1964), reprinted in PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT 328, 337 (Gertrude Ezorsky ed., 1972) (“[Punishment’s] infliction demands justification.”).

⁷ Perhaps few, if any, states implement a purely retributivist punishment scheme, but a few states come quite close. See, e.g., CAL. PENAL CODE § 1170(a)(1) (West 2004)

twenty-years imprisonment (or, alternatively, a sentence ranging from twenty to twenty-five years of imprisonment). Suppose further that under retributivism, (no less than) twenty-years imprisonment is the offender's proportional and deserved⁸ punishment. After serving, say, five years of her sentence, the prisoner objects that she is being unjustly punished: "I understand that I may deserve twenty-years imprisonment as my proportional punishment under retributivism, but what I have received thus far—five-years imprisonment—is neither deserved nor is proportional to the crime I committed. Under retributivism, I should not have to suffer what I do not deserve in order that I may be given what I perhaps do deserve. Since my punishment thus far is, and will continue to be (prior to serving the full twenty years), undeserved, disproportional, and unjustified, then according to retributivism's own principles, I must immediately be released from prison."

The prisoner's argument perhaps seems laughable because we implicitly adopt a holistic perspective in thinking about the justification of punishment. We implicitly assume that the relevant inquiry is whether the sentence or whole punishment is justified. But since any sentence of punishment of a temporal term of imprisonment will necessarily contain constituent parts that also constitute punishment, and that which constitutes punishment requires justification, a holistic perspective fails to accommodate the justification of constituent parts. To justify the actual infliction of that which constitutes punishment, the holistic perspective must be replaced by, or at least supplemented with, an atomistic perspective accommodating the justification of constituent parts. Since punishment may come either in the form of a sentence or whole punishment as well as in the constituent parts of a whole punishment, an atomistic perspective is crucial.

Perhaps we have tended to overlook the need for an atomistic perspective

("The Legislature finds and declares that the purpose of imprisonment for crime is punishment."). Noted criminal law scholar Sanford Kadish observes that the California Legislature has thereby endorsed retributivism as the purpose of punishment. Sanford H. Kadish, *Foreword: The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679, 701 (1994). See also Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1356 (2000) (noting that "California endorsed retribution as 'the' purpose for its punishment"). For the claim that Colorado and Pennsylvania feature retributivist, or principally retributivist, punishment schemes, see *id.* at 1330, 1356. However, nothing in the argument of this Article depends on whether there actually are or are not jurisdictions adopting a purely retributivist approach.

⁸ See MOORE, *supra* note 1, at 88 ("The distinctive aspect of retributivism is that the moral desert of an offender is a *sufficient* reason to punish him or her."); Hugo A. Bedau, *Concessions to Retribution in Punishment*, in JUSTICE AND PUNISHMENT 51, 52 (J.B. Cederblom & William L. Blizек eds., 1977) ("[A] retributivist holds that a punishment is just if and only if the offender deserves it."); Greenawalt, *supra* note 1, at 347 (noting that retributivism is the view that "punishment is justified because people deserve it").

(and even now are still quite skeptical) because of our implicit reliance on the once-venerable legal doctrine of the greater includes the lesser. Stated simply, the doctrine holds that the justifiability, permissibility, or power to effect a greater course of action necessarily includes the justifiability, permissibility, or power to effect a lesser course of action.⁹ Applying the doctrine to the prisoner's claim, if the greater punishment of twenty-years imprisonment is proportional, deserved, and justified, then the lesser five-years imprisonment thus far must necessarily also be proportional, deserved, and justified. While the doctrine may supply the "common-sense"¹⁰ answer to the prisoner's argument, the doctrine itself is logically suspect¹¹ and has recently fallen into disfavor by courts.¹² Moreover, retributivism is illustrative of why the doctrine is fallacious. Since retributivism justifies only proportional punishment—no more and no less than what is deserved—, naturally a lesser punishment is disproportional, undeserved, and

⁹ For example, a state's greater power to withhold a criminal defense altogether includes the lesser power of conditioning the assertion of that defense on the defendant bearing the burden of persuasion for that defense. See *Patterson v. New York*, 432 U.S. 197, 211 (1977). For an early use of the greater includes the lesser doctrine, see *Doyle v. Continental Ins. Co.*, 94 U.S. 535, 542 (1876) ("If the State has the [greater] power to cancel the license . . . [i]t has the [lesser] power to determine for what causes and in what manner the revocation shall be made.").

Justice Oliver Wendell Holmes is the doctrine's historical champion. See, e.g., Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593, 597–99 (1990) (describing the doctrine as "Holmesianism"); Peter Westen, *The Rueful Rhetoric of "Rights,"* 33 UCLA L. REV. 977, 1011 n.87 (1986) (referring to Holmes as one of the doctrine's "leading spokesmen"); Charles R. Bogle, Note, *"Unconscionable" Conditions: A Contractual Analysis of Conditions on Public Assistance Benefits*, 94 COLUM. L. REV. 193, 197 n.14 (1994) (observing that Holmes is the doctrine's "greatest proponent"). For an example of Holmes' use of the doctrine, see *infra* note 86.

¹⁰ See, e.g., *United States v. O'Neil*, 11 F.3d 292, 296 (1st Cir. 1993) ("The principle that the grant of a greater power includes the grant of a lesser power is a bit of common sense that has been recognized in virtually every legal code from time immemorial.").

¹¹ See Mitchell N. Berman, *Commercial Speech and the Unconstitutional Conditions Doctrine: A Second Look at "The Greater Includes the Lesser,"* 55 VAND. L. REV. 693, 708–11 (2002) (explaining that the claim that the greater necessarily entails the lesser is logically invalid); Robert O'Neil, *Unconstitutional Conditions: Welfare Benefits with Strings Attached*, 54 CAL. L. REV. 443, 456–63 (1966) (same); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1428–56 (1989) (same).

¹² See, e.g., *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 511 (1996) ("[T]he 'greater-includes-the-lesser' argument should be rejected for the . . . important reason that it is inconsistent with both logic and well-settled doctrine."); Berman, *supra* note 11, at 700 (noting that "the greater/lesser approach has fallen out of the range of legitimate legal argument").

unjustified.¹³ So, for retributivism, that a greater punishment is proportional, deserved, and justified does not entail that a lesser punishment is also proportional, deserved, and justified. The inapplicability of the greater-includes-the-lesser doctrine to retributivism suggests that our exclusive reliance on a holistic perspective is misplaced.

Another possible common-sense solution is that it is necessary to first punish for five years in order to be able to punish for twenty years, and what is necessary must be justified. Punishing the offender first with five-years imprisonment is a necessary means to obtaining the end-result of the prisoner being punished for the full, deserved, proportional, and justified twenty-years imprisonment. Thus, the end-result of twenty-years imprisonment of the offender justifies the means—first punishing the prisoner for five years—by which that end-result is obtained. But this argument that the end justifies the means is an argument of consequentialism¹⁴—the principal alternative theory of punishment¹⁵—and, thus, unavailable to retributivism.¹⁶

¹³ Under retributivism, both punishments greater than what is proportional and deserved as well as punishments less than what is proportional and deserved are disproportional, undeserved and thus unjustified. *See, e.g.,* HEGEL, *supra* note 1, § 214 at 245 (“[A]n injustice is done if there is even one lash too many, or one dollar or groschen, one week or one day in prison too many or too few.”); NORVAL MORRIS & MICHAEL TONRY, *BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM* 84 (1990) (“A thoroughgoing retributivist would claim that the punishment to be imposed on an offender should be ‘exactly as much as he [or she] deserves, no more, no less.’”); PRIMORATZ, *supra* note 2, at 162 (referring to punishments that are “either too much, or too little, and in both cases disproportionate, and thus unjust and wrong, from the standpoint of the retributive theory”); Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1691 (1992) (“From a retributive point of view, punishments that are too lenient are as bad as (and sometimes worse than) punishments that are too severe.”).

¹⁴ Consequentialism as a theory of punishment justifies punishment not because the offender deserves it, but rather because of the good consequences generated by punishment. If the benefits or good consequences of punishment outweigh the costs or bad consequences, punishment is justified. If not, punishment is unjustified. John Rawls offers the following concise account:

[O]nly future consequences are material to present decisions, punishment is justifiable only by reference to the probable consequences of maintaining it as one of the devices of social order. Wrongs committed in the past are, as such, not relevant considerations for deciding what to do. If punishment can be shown to promote effectively the interest of society it is justifiable, otherwise it is not.

Rawls, *supra* note 1, at 5. For a comparison of consequentialism and retributivism, see *infra* notes 23–40 and accompanying text.

¹⁵ *E.g.,* PRIMORATZ, *supra* note 2, at 9 (noting that most of the moral justifications for punishment are either consequentialist or retributive); A.M. Quinton, *On Punishment*, 14 ANALYSIS 512 (1954), *reprinted in* PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT, *supra* note 6, at 6, (arguing that consequentialism and retributivism “exhaust the

The prisoner's argument raises the difficulty for retributivism that regardless of whether her punishment thus far is justified or unjustified, she cannot justifiably be punished the remaining fifteen years of her presumably proportional and deserved sentence. Assume *arguendo* that the offender's five-years imprisonment thus far is justified. Since retributivism justifies only deserved and proportional punishments, then her five-years imprisonment thus far must be her deserved and proportional punishment—no more and no less.¹⁷ But if five-years imprisonment thus far is the deserved and proportional punishment for the offender's crime, then that forecloses the possibility that twenty-years imprisonment can be the deserved, proportional, and justified punishment. Moreover, if her punishment thus far of five-years imprisonment is the deserved and proportional punishment, then her punishment is complete. If the five years thus far is the deserved and proportional punishment, then any further punishment beyond the five years thus far would be disproportional, undeserved, and unjustified. As a result, even if we assume that the five-years imprisonment thus far is justified, the prisoner still must be immediately released from prison because any continued punishment would be disproportional, undeserved, and thus unjustified under retributivism. And if instead the five-years imprisonment thus far is unjustified, according to retributivism's own principles, the prisoner must still be immediately released from prison. The prisoner's seemingly absurd claim is becoming alarmingly plausible.

Regardless of whether the punishment thus far is justified or unjustified, the prisoner cannot justifiably receive the very punishment that retributivism finds deserved, proportional, and justified. Either way, under retributivism's own principles, the prisoner must be immediately released from prison. And this difficulty for retributivism would ensue not only for this particular temporal term of imprisonment and this particular offender.¹⁸ The difficulty will arise under retributivism for any offender *O* whose deserved and proportional punishment is any temporal term of imprisonment *P*. Since in order to inflict *P* it is first necessary to inflict punishment less than *P*, and any punishment less than *P* is disproportional and undeserved, inflicting *P* necessarily entails inflicting disproportional, undeserved, and unjustified punishment.

Retributivism's inability to justify any temporal term of imprisonment

possibilities" for justifying punishment).

¹⁶ See, e.g., DUFF, *supra* note 6, at 1 ("[A] common and defining feature of . . . [consequentialism is that it requires] punishment to be justified by reference to benefits to which it is contingently related as a means to a further end.") (emphasis omitted). See also *infra* notes 40–46 and accompanying text.

¹⁷ See *supra* notes 2, 8, 13, and accompanying text.

¹⁸ That is, there is nothing special in the circumstances of this particular offender and this particular term of imprisonment. The problem is recurring and systemic.

for any offender is not merely of theoretical concern. While few jurisdictions adopt a purely retributivist sentencing philosophy, the perceived legitimacy of theories of punishment, and retributivism, in particular, affects a host of issues in criminal justice.¹⁹ But of even greater practical significance is that retributivism's failing is shared by a mixed or hybrid theory of punishment, embracing both retributivist and consequentialist principles, that is variously termed "modified just desert," "limiting retributivism," or simply "LR."²⁰ LR is widely recognized as the "consensus" model of state and federal sentencing codes and guidelines²¹ as well as the newly proposed revised

¹⁹ With respect to the influence of theories of punishment in general, the theories a jurisdiction adopts "affect jury selection, instructions, and arguments; sentencing and parole; and even assessment of the legitimacy of particular punishments." Cotton, *supra* note 7, at 1317. With respect to the influence of retributivism in particular, see, for example, Spaziano v. Florida, 468 U.S. 447, 461 (1984) (endorsing retributivism as the "primary justification of the death penalty"); Guyora Binder & Nicholas J. Smith, *Framed: Utilitarianism and Punishment of the Innocent*, 32 RUTGERS L.J. 115, 117 (2000) (noting retributivism's influence on the decline of systems of probation and parole); Russell L. Christopher, *The Prosecutor's Dilemma: Bargains and Punishments*, 72 FORDHAM L. REV. 93, 118–34 (2003) (contending that the perceived illegitimacy of plea bargains and immunity deals stems largely from retributivism); Robert J. Cottrol, *Hard Choices and Shifted Burdens: American Crime and American Justice at the End of the Century*, 65 GEO. WASH. L. REV. 506, 507–08 (1997) (book review) ("[S]ince the mid-seventies retribution has come back with a vengeance, enjoying today a greater prominence in public discourse over crime and punishment than at any other time in post-war America. Nowhere is this mood better demonstrated than in the debate over the death penalty."); Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1303 (2001) ("[T]hree-strikes-and-you're-out' policies . . . seem to be fueled by concerns about retribution . . ."); Richard S. Murphy, *The Significance of Victim Harm: Booth v. Maryland and the Philosophy of Punishment in the Supreme Court*, 55 U. CHI. L. REV. 1303, 1308 (1988) (explaining retributivism's opposition to aspects of the victims' rights movement); Michael Moore, *Victims and Retribution: A Reply to Professor Fletcher*, 3 BUFF. CRIM. L. REV. 65, 67 (1999) (same).

²⁰ For the equivalence of "modified just desert" and "limiting retributivism," see Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19, 24 n.18, 51–52 (2003).

²¹ Richard S. Frase, *Limiting Retributivism: The Consensus Model of Criminal Punishment*, in THE FUTURE OF IMPRISONMENT IN THE 21ST CENTURY (Michael Tonry ed., forthcoming 2004) (manuscript at 2) (on file with author) ("[I]t is clear that some sort of limiting retributive (LR) theory is already the consensus model."), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=420324 (last visited August 20, 2004). Modified just desert or LR underlies both state and federal sentencing guidelines:

[T]he vast majority of the federal sentencing guidelines clearly implement a philosophy of punishment commonly called "modified just desert." Strikingly, this is the same philosophy adopted by every state sentencing commission that has issued sentencing guidelines. It appears to be emerging as the dominant philosophy

Model Penal Code Sentencing provisions of the American Law Institute.²²

LR's considerable influence in sentencing codes and guidelines stems from its appealing combination of both retributivist and consequentialist principles.²³ The retributivist principles of desert and proportionality determine the lower and upper limits of a range of justified punishment.²⁴ Only within that range may consequentialist considerations of deterrence, rehabilitation, and incapacitation influence a sentence.²⁵ Though not purely retributivist, LR is also unable to justify temporal terms of imprisonment. This is because the early stages of any temporal term of imprisonment will necessarily be less than the deserved and proportional minimum punishment under LR. For example, suppose that LR justifies a range of deserved punishment for our offender of between twenty to twenty-five years of imprisonment. At the five-year stage of the offender's term of imprisonment, the offender's punishment is less than, and thus outside of, the range of deserved and justified punishment under LR. As a result, the predominant approach in state and federal sentencing cannot justify temporal terms of imprisonment.

That any sentencing approach setting a minimum punishment based on the retributivist principles of desert and proportionality fails to justify temporal terms of imprisonment provides support for abolishing the much-maligned "mandatory minimums."²⁶ For perhaps the most widely known

of sentencing in America today.

Hofer & Allenbaugh, *supra* note 20, at 24.

²² See THE AMERICAN LAW INSTITUTE, MODEL PENAL CODE: SENTENCING 36–37 (Kevin R. Reitz, Reporter, April 11, 2003,) (report submitted to the members of the ALI for their consideration at the annual meeting May 12–14, 2003) ("The approach in black-letter drafting is borrowed from Norval Morris's theory of 'limiting retributivism' (or LR).") (citation omitted); Kevin R. Reitz, *American Law Institute, Model Penal Code: Sentencing, Plan for Revision*, 6 BUFF. CRIM. L. REV. 525, 528 (2002) ("The new ordering of sentencing purposes recommended for the revised Code is an adaptation of Norval Morris's theory of limited retributivism . . .").

²³ See, e.g., Reitz, *supra* note 22, at 528–29 ("Limiting retributivism provides a flexible theoretical base and allows for the possibility that different purposes, or combinations of purposes, can be assigned priority positions for different classes of criminal offenses.").

²⁴ See, e.g., NORVAL MORRIS, THE FUTURE OF IMPRISONMENT 78 (1974) (establishing "a retributive floor to punishment as well as a retributive ceiling"). For further discussion, see *infra* notes 143–144 and accompanying text.

²⁵ See, e.g., MORRIS, CRIMINAL LAW, *supra* note 4, at 167 ("In the fine-tuning of punishment between the upper and lower limits of retributively deserved punishment . . . utilitarian values should apply."). For further discussion, see *infra* note 145 and accompanying text.

²⁶ The U.S. Sentencing Commission provides the following concise account:

[Mandatory minimums] refer to statutory provisions requiring the imposition of at

example, the sale of either 5000 grams or more of powder cocaine or 50 grams or more of crack cocaine is punishable by imprisonment for no less than ten years.²⁷ In recent public addresses Supreme Court Justices Kennedy and Breyer have fervently advocated Congress to repeal mandatory minimum sentencing.²⁸ In addition to perhaps a majority of Supreme Court Justices opposed to mandatory minimums,²⁹ twelve federal courts of appeals have issued statements declaring their opposition.³⁰ While mandatory minimums

least a specified minimum sentence when criteria specified in the relevant statute have been met. Criteria requiring imposition of minimum sentences vary. For example, some mandatory sentences are triggered by offense characteristics, such as an amount of drugs or where the drugs were sold. Others are triggered by offender characteristics, such as the prior conviction for the same offense, or by victim characteristics, such as the age of the person to whom the drugs were sold.

U.S. SENTENCING COMMISSION, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 4 (1991) (citations omitted). For a history of the development of mandatory minimum sentencing, see *id.* at 5–10. For criticisms of mandatory minimums, see, for example, *id.* at ii–iv (summarizing the ineffectiveness and sentencing disparity engendered by mandatory minimums); Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L. REV. 61, 121 (1993) (contending that mandatory minimums are ineffective, are applied in a discriminatory fashion against minorities, generate sentencing disparity, penalize defendants for asserting constitutional rights, and vest too much power in prosecutors). For further criticisms of mandatory minimums, see *infra* notes 154–163 and accompanying text. For further discussion of mandatory minimums, see *infra* Part IV.B.

²⁷ Controlled Substances Act, 21 U.S.C. § 841(b)(1)(A)–(B) (1994). This amounts to a 100:1 ratio in the severity of punishment for crack cocaine as compared to powder cocaine. This ratio, and its disparate racial impact on minorities, has survived equal protection challenges in the Supreme Court, *United States v. Armstrong*, 517 U.S. 456 (1996), as well as in every federal court of appeals. Charles Doyle, *Federal Mandatory Minimum Sentencing Statutes*, in MANDATORY MINIMUM SENTENCING: OVERVIEW AND BACKGROUND 47, 71 n.79 (Lawrence V. Brinkley ed., 2003).

²⁸ Justice Stephen Breyer, Remarks at the John F. Kennedy Library and Foundation Forum 10–11 (Sept. 21, 2003) (transcript at http://www.jfklibrary.org/forum_bryer.html) (last visited Feb. 25, 2004) (commenting that mandatory minimum sentences are both bad policy and unfair); Justice Anthony M. Kennedy, Address at the American Bar Association Annual Meeting 2–5 (Aug. 9, 2003; rev. Aug. 14, 2003) (transcript at http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html) (last visited Feb. 28, 2004) (contending that mandatory minimums are excessively harsh and too costly). For further discussion of Justice Breyer's and Justice Kennedy's views on mandatory minimum sentencing, see *infra* notes 156–162, 167, 173, and accompanying text.

²⁹ Breyer, *supra* note 28, at 10 (referring to himself, Chief Justice Rehnquist, Justice Kennedy “and others on our court” as being opposed to mandatory minimum sentencing).

³⁰ Suzanne Cavanagh & David Teasley, *Mandatory Minimum Sentencing for Federal Crimes: Overview and Analysis*, in MANDATORY MINIMUM SENTENCING: OVERVIEW AND BACKGROUND, *supra* note 27, at 1, 10.

are motivated by a variety of sentencing concerns,³¹ retributivism is identified as the primary support and motivation.³² To the extent that retributivism or LR³³ does motivate mandatory minimums, this Article provides the conceptual framework to abolish mandatory minimums.

This Article advances the novel argument that neither retributivism nor any scheme of punishment setting a minimum punishment based on the retributivist principles of desert and proportionality is able to justify any temporal term of imprisonment for any offender.³⁴ Part II explicates retributivism by contrasting it with consequentialism. Part III poses a number of conditions or criteria that any claimed retributivist justification of temporal terms of imprisonment must satisfy and explains retributivism's difficulty with meeting them. This Part also canvasses the other, principal theories' successful justifications of such punishment; but these justifications are unavailable to, and incompatible with, retributivism. In light of the radical and no doubt counter-intuitive nature of the thesis advanced in this Article, Part IV anticipates a number of possible attempts in identifying a

³¹ U.S. SENTENCING COMMISSION, *supra* note 26, at 13–14 (listing “six commonly-offered rationales for mandatory minimum sentencing:” (i) retribution/just deserts, (ii) deterrence, (iii) incapacitation, (iv) reduction of sentencing disparity, (v) inducement of witnesses supplying inculpatory information on the criminal activity of others, and (vi) inducement of guilty pleas).

³² See, e.g., *id.* at 13 (reporting that a retributivist/just deserts approach is “the most commonly-voiced goal of mandatory minimum penalties”). For further discussion, see *infra* notes 165–173 and accompanying text.

³³ FORER, *supra* note 4, at 53 (“Norval Morris’s theories [of LR] underlie these laws [mandatory minimum sentencing].”).

³⁴ This problem is distinct from the standard criticism that retributivism lacks a precise calculus for determining how much punishment an offender deserves for any given crime:

The most common challenge to retributivism has been its alleged vagueness: everyone may agree that five years in prison is unjustly harsh for shoplifting, or that a five dollar fine is unjustly lenient desert for rape, but beyond such clear cases our intuitions seem to fail us. Is two years, five years, or ten years the proper sanction for rape? . . . Our sense of just deserts here seems to desert us.

Leo Katz, *Criminal Law*, in A COMPANION TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 80, 80–81 (Dennis Patterson ed., 1996). See, e.g., A.C. EWING, THE MORALITY OF PUNISHMENT 40 (1929) (discussing, with respect to retributivism, “the impossibility of estimating the moral guilt of the offender and the degree of punishment proportionate to it”); Dolinko, *supra* note 3, at 1636 (“[A] stock objection to retributivism [is] that there is simply no workable way to determine just *what* punishment a criminal deserves.”). The problem for retributivism of the indeterminacy of proportionality is circumvented here by stipulating what the deserved, proportional punishment is for the offender’s offense—twenty-years imprisonment. The difficulty of retributivism addressed in this Article is not the determination of *what* the proportional punishment is, but rather retributivism’s inability to justify *any* temporal term of imprisonment for *any* offender’s offense.

retributivist justification for temporal terms of imprisonment. But, as is explained, none of these attempted solutions are successful. Part V demonstrates that the inability to justify temporal terms of imprisonment is not limited to retributivism and is not merely of theoretical interest. The predominant sentencing approach, undergirding state and federal sentencing guidelines and codes as well as the newly proposed revisions of the Model Penal Code Sentencing provisions, embracing a mixture of both retributivist and consequentialist principles, also fails to justify temporal terms of imprisonment.

This Article concludes that neither the leading theoretical account of punishment nor the consensus approach in sentencing guidelines and codes is able to justify the predominant mode of punishment—temporal terms of imprisonment. In order to justify temporal terms of imprisonment, either consequentialism or a mixed theory (setting the lower limit of punishment based on consequentialist concerns and setting the upper limit on either retributivist or consequentialist principles) must be adopted.

II. RETRIBUTIVISM VERSUS CONSEQUENTIALISM

Punishment requires justification because it consists of the deliberate infliction of pain, suffering, and deprivation, which is *prima facie* wrong.³⁵ Although most agree that punishment is susceptible to justification, the age-old debate³⁶ over the justification of punishment stems largely from the impasse between retributivism and consequentialism.³⁷ A consequentialist account justifies punishment, not because the offender deserves it, but because of the good consequences generated by punishment.³⁸ In contrast,

³⁵ See, e.g., JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 170 (Ch. XIII) (Prometheus Books 1988) (1781) (stating that “all punishment in itself is evil”); HEGEL, *supra* note 1, § 92 at 120 (because “coercion [which], taken in the abstract, is therefore, contrary to right”) (emphasis omitted); C.L. TEN, CRIME, GUILT, AND PUNISHMENT: A PHILOSOPHICAL INTRODUCTION 3 (1987) (“We are not normally justified in depriving people of the things which they value, such as their liberty”); see also *supra* note 6.

³⁶ See, e.g., A. John Simmons et al., *Introduction* to PUNISHMENT: A PHILOSOPHY AND PUBLIC AFFAIRS READER i, vii (A. John Simmons et al. eds., 1995) (“The problem of justifying legal punishment has remained at the heart of legal and social philosophy from the very earliest recorded philosophical texts to the most recent.”).

³⁷ See R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 3 (2001) (“The philosophy of punishment has long been a battleground for various versions of consequentialism . . . and retributivism . . .”).

³⁸ The leading influence on, and most well-known version of, the consequentialist justification of punishment is Jeremy Bentham’s utilitarianism. PRIMORATZ, *supra* note 2, at 13 (“[T]he most comprehensive and thoroughly developed formulation of the theory in philosophical literature is still to be found in the writings of Bentham.”). If punishment

retributivism justifies punishment not by recourse to the good consequences promoted, but solely because the offender deserves it.³⁹

While consequentialism conceives of punishment as a means to an end,⁴⁰ retributivism views punishment as an end, or good, in itself.⁴¹ Under

generates more utility, happiness, pleasure, or good consequences than disutility, suffering, pain, or bad consequences, then punishment is eligible to be justified. For Bentham, conduct is to be judged according to the principle of utility, BENTHAM, *supra* note 35, at 2 ("By the principle of utility is meant that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party . . .") (footnote omitted). The utility or good consequences to be promoted by punishment generally entails crime prevention. According to Bentham, "[t]he immediate principal end of punishment is to control action." *Id.* at 170 n.1. "General [crime] prevention ought to be the chief end of punishment, as it is its real justification." 1 JEREMY BENTHAM, *Principles of Penal Law*, in THE WORKS OF JEREMY BENTHAM 396 (John Bowring ed., 1962). See, e.g., JEFFRIE G. MURPHY & JULES L. COLEMAN, PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE 118 (rev. ed. 1990) ("While incapacitation and reform may sometimes figure in the justification of punishment, *deterrence* has always been the mainstay . . ."); PRIMORATZ, *supra* note 2, at 10 ("The most important consequences of punishment are its preventive effects.").

³⁹ The theories of Immanuel Kant and G.W.F. Hegel exert the greatest historical influence on retributivism. PRIMORATZ, *supra* note 2, at 13 ("The most important and influential among classical retributivists are Kant and Hegel."). Kant articulates the fundamental retributivist thesis: punishment "must always be inflicted upon him [an offender] only *because he has committed a crime*." KANT, *supra* note 1, at 140. See Quinton, *supra* note 15, at 7 ("The essential contention of retributivism is that punishment is only justified by guilt.").

For Hegel, retribution is the bond that welds crime to punishment. HEGEL, *supra* note 1, § 101 at 129 (explaining that committing the criminal "deed brings its own retribution with it"). Punishment is justified because it annuls, cancels or negates crime. See PRIMORATZ, *supra* note 2, at 74 (observing that punishment as the annulment of an offense is "one of the basic tenets of his [Hegel's] theory of punishment"). Hegel explains that both punishment (in the abstract) and crime are forms of coercion. Crime is the first or "initial use" of coercion. HEGEL, *supra* note 1, § 95 at 121. Hegel refers to punishment as the subsequent or "second coercion." *Id.* § 93 at 120. Because "coercion is cancelled by coercion; it [punishment] is therefore not only conditionally right but necessary—namely as a second coercion which cancels an initial coercion." *Id.* (emphasis omitted). By being, in Hegel's famous phrase, "a negation of the negation," *id.* § 97 at 123, punishment is a "restoration of right." *Id.* § 99 at 124.

⁴⁰ See R.A. Duff, *Penal Communications: Recent Work in the Philosophy of Punishment*, 20 CRIME & JUSTICE 1, 5–6 (1996).

⁴¹ See KANT, *supra* note 1, at 140 ("Punishment . . . can never be inflicted merely as a means to promote some other good for the criminal himself or for civil society."); see also Rawls, *supra* note 1, at 5 ("The state of affairs where a wrongdoer suffers punishment is morally better than the state of affairs where he does not; and it is better irrespective of any of the consequences of punishing him.").

consequentialism, punishment is an evil⁴² that should not be imposed unless outweighed by the good consequences it generates.⁴³ That is, the ends (the good consequences of, for example, deterrence and crime prevention) generated by punishment justify the means (punishment) by which those good consequences are generated. Thus, under consequentialism, punishment is an instrumental good—that which lacks independent value but leads to other goods that do independently have value.⁴⁴ In contrast, under retributivism, punishment is its own end; punishment is an intrinsic good—a good that has independent value even if it does not lead to other goods.⁴⁵ As a result, whereas consequentialism is prospective in seeking to promote future good, retributivism is retrospective in seeking to do justice for a crime already committed.⁴⁶

⁴² BENTHAM, *supra* note 35, at 170 (“[P]unishment is mischief: all punishment in itself is evil.”).

⁴³ *Id.* (maintaining that punishment “ought only to be admitted in as far as it promises to exclude some greater evil”) (footnote omitted). Punishment of an offender is impermissible if the cost of punishment outweighs its good consequences. According to Bentham, punishment should not be inflicted at all under either of the following four conditions, where punishment would be: (i) “groundless” because there is no crime or harm, (ii) “inefficacious” because the crime cannot be deterred, (iii) “unprofitable, or too expensive” because the evil of the punishment would exceed the crime, and (iv) “needless” because the crime may be deterred by other means than punishment or does not require deterrence. *Id.* at 171–77, 314–23.

⁴⁴ For discussion of the instrumental good/intrinsic good distinction, see WILLIAM FRANKENA, *ETHICS* 80–83 (1973); GERALD F. GAUSS, *VALUE AND JUSTIFICATION: THE FOUNDATIONS OF LIBERAL THEORY* 126–30 (1990); G.E. MOORE, *PRINCIPIA ETHICA* 25–30 (1903); MOORE, *supra* note 1, at 157; ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 414 (1981); Duff, *supra* note 40, at 5–7.

⁴⁵ MOORE, *supra* note 1, at 157 (“[W]hat is distinctively retributivist is the view that the guilty receiving their just deserts is an intrinsic good.”) (emphasis omitted). For the view that retributive punishment is understood as an intrinsic good see, for example, MOORE, *supra* note 1, at 157; NOZICK, *supra* note 44, at 374; Benn, *supra* note 2, at 30; Lawrence Davis, *They Deserve to Suffer*, 32 *ANALYSIS* 136, 136 (1972); Duff, *supra* note 40, at 6.

⁴⁶ Retributivism roots the justification of punishment not prospectively in punishment’s consequences, Gertrude Ezorsky, *The Ethics of Punishment, in PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT*, *supra* note 6, at xi, xviii (“For all retributivists punishment has moral worth independently of any further desirable effects.”), but retrospectively in punishment’s relation to a past offense. BERNARD BOSANQUET, *SOME SUGGESTIONS IN ETHICS* 188 (1919) (commenting that retributive “[p]unishment is *prima facie* retrospective; it deals with the past”); DUFF, *supra* note 6, at 4 (explaining that “all [retributivist theories] find the sense and the justification of punishment in its relation to a past offence”); HERBERT MORRIS, *ON GUILT AND INNOCENCE: ESSAYS IN LEGAL PHILOSOPHY AND MORAL PSYCHOLOGY* 38 (1976) (noting that retributive “[p]unishment, then, focuses on the past”); A. Wesley Cragg, *Punishment, in THE PHILOSOPHY OF LAW: AN ENCYCLOPEDIA* 706, 707–08 (Christopher Berry Gray

While consequentialism determines the degree of punishment for a given offense based on maximizing the consequence sought to be promoted,⁴⁷ retributivism bases the degree of punishment solely on the degree of desert of an offender. For Immanuel Kant, the degree of punishment is based on the specific equality between crime and punishment:⁴⁸ "what is done to [the offender] in accordance with penal law is what he has perpetrated on others."⁴⁹ This is the principle underpinning Kant's account of the *lex talionis*⁵⁰ of an "eye for an eye, a tooth for a tooth" featured in the Bible.⁵¹ Though adopting the principle of "what the criminal has done should also happen to him,"⁵² G.W.F. Hegel only requires a general equality between the crime and its punishment.⁵³ With the rise of incarceration as the predominant

ed., 1999) (referring to retributivism as "backward-looking" and consequentialism as "forward-looking").

⁴⁷ Bentham promulgates an elaborate set of rules for determining the degree of punishment for the commission of an offense. Because punishment is an evil, the upper limit on how much punishment may be imposed is no more than what is "necessary" to sufficiently deter crime. BENTHAM, *supra* note 35, at 182. The minimum or lower limit of the degree of punishment is based, in substantial part, on the conjunctive effect of three rules: (i) the punishment must be "sufficient to outweigh that of the profit of the offence," *id.* at 179 (emphasis omitted) (citations omitted), (ii) the greater degree of temptation to commit the offense, the greater the degree of punishment, *id.* at 180, and (iii) the greater the degree of harm or "mischief" the offense causes, the greater the degree of punishment. *Id.* at 181 (emphasis omitted).

⁴⁸ KANT, *supra* note 1, at 141.

⁴⁹ *Id.* at 169.

⁵⁰ Kant sets forth the following famous account of the principle of the *lex talionis*:

[W]hatever undeserved evil you inflict upon another within the people, that you inflict upon yourself. If you insult him, you insult yourself; if you steal from him, you steal from yourself; if you strike him, you strike yourself; if you kill him, you kill yourself. But only the *law of retribution (ius talionis)* . . . can specify definitely the quality and the quantity of punishment; all other principles are fluctuating and unsuited for a sentence of pure and strict justice because extraneous considerations are mixed into them.

Id. at 141.

⁵¹ *Exodus* 21:24.

⁵² HEGEL, *supra* note 1, § 101 at 127 (emphasis omitted).

⁵³ Hegel acknowledges that Kant's simple version of the *lex talionis* may be reduced to the absurd:

[I]t is very easy to portray the retributive aspect of punishment as an absurdity (theft as retribution for theft, robbery for robbery, an eye for an eye, and a tooth for a tooth, so that one can even imagine the miscreant as one-eyed or toothless); but the concept has nothing to do with this absurdity, for which the introduction of that [idea of] specific equality is alone to blame.

Id. § 101 at 128 (emphasis omitted). Rather than a specific equality between a crime and

mode of punishment and the corresponding decline of the corporal punishments featured in the *lex talionis*, modern retributivists typically no longer adhere to the *lex talionis*,⁵⁴ but rather simply require that punishment be proportional to the crime and the offender's just deserts.⁵⁵

III. JUSTIFYING TEMPORAL TERMS OF IMPRISONMENT

This Part first supplies six conditions or criteria that any attempt at a retributivist justification of temporal terms of imprisonment must satisfy. This Part next demonstrates that the other principal theories of punishment can successfully justify temporal terms of imprisonment. But these justifications are incompatible with retributivism and only raise further conditions for any claimed retributivist justification to satisfy. These conditions or criteria should be understood conjunctively. An adequate retributivist justification of temporal terms of imprisonment must satisfy them all.

A. Conditions for a Retributivist Justification

This section presents six conditions or criteria for an adequate retributivist justification of temporal terms of imprisonment and explains the difficulty in satisfying them. First, the offender's punishment thus far must be shown to be proportional, despite that only the offender's whole punishment is proportional. Second, the offender's punishment thus far must

its punishment (e.g., theft as retribution for theft), Hegel requires merely that they be generally equal, or comparable:

Equality remains merely the basic measure of the criminal's *essential* deserts, but not of the specific external shape which the retribution should take. It is only in terms of this specific shape that theft and robbery [on the one hand] and fines and imprisonment etc. [on the other] are completely unequal, whereas in terms of their value, i.e. their universal character as injuries [*Verletzungen*], they are *comparable*.

Id. § 101 at 129. In this way, the absurdities of Kant's simple *lex talionis* are avoided. For example, a penniless thief may be adequately punished by a term of imprisonment comparable in character and value to the theft.

⁵⁴ E.g., MOORE, *supra* note 1, at 88 ("It is quite possible to be a retributivist and to be against . . . *lex talionis* . . ."); see HUGO A. BEDAU, DEATH IS DIFFERENT 262–63 n.61 (1987) (listing numerous modern retributivist theories rejecting the *lex talionis*).

⁵⁵ E.g., HART, *supra* note 5, at 234 (noting that "modern retributive theory is concerned with proportionality"); MOORE, *supra* note 1, at 88 (observing that "retributivists . . . are committed to the principle that punishment should be graded in proportion to desert"). For the view that proportionality is exclusively a principle of retributivism, see *Harmelin v. Michigan*, 501 U.S. 957, 989 (1991) (It is "difficult even to speak intelligently of 'proportionality,' once deterrence and rehabilitation are given significant weight. Proportionality is inherently a retributive concept . . .").

be shown to constitute an intrinsic good, despite that only the offender's whole punishment is an intrinsic good. Third, any asserted justification of the offender's punishment thus far must utilize a retrospective outlook, despite that such a perspective is only helpful in justifying the whole punishment. Fourth, any claimed justification of the offender's punishment thus far must not also justify the offender receiving *only* the punishment thus far and no more. Fifth, any purported justification must supply an adequate explanation as to why the punishment thus far is justified, but the offender receiving only the punishment thus far would be unjustified. Sixth, any propounded justification of the offender's punishment thus far must not preclude the remainder of the punishment under the sentence from being justified.

1. *Proportionality and Desert*

For a punishment to be justified under retributivism, the punishment must be proportional to the offender's desert or crime.⁵⁶ An offender's desert is determined by the degree of wrongdoing committed and the degree of culpability with which the wrongdoing was committed.⁵⁷ If twenty-years imprisonment is the offender's deserved and proportional punishment, either more than or less than twenty-years imprisonment is disproportional, undeserved, and unjustified.⁵⁸ Since the five-years imprisonment thus far is less than the deserved and proportional punishment of twenty-years imprisonment, the five-years imprisonment thus far is undeserved and disproportional. And since the prisoner's punishment thus far is disproportional and undeserved, it is unjustified.

2. *Intrinsic Good*

Retributivism views deserved and proportional punishment as an intrinsic good⁵⁹—"right or good in itself, apart from the further consequences to which it might lead."⁶⁰ While the five-years imprisonment thus far might be of instrumental value in leading to the offender being punished for twenty years, it is not an intrinsic good. Under retributivism, only those punishments

⁵⁶ See *supra* notes 2, 55, and accompanying text.

⁵⁷ See, e.g., MOORE, *supra* note 1, at 71 ("The meaning of desert: that the desert which triggers retributive punishment is itself a product of the moral wrong(s) done by an individual, and the moral culpability with which he did those wrongs."); see also *supra* notes 2, 55, and accompanying text.

⁵⁸ See *supra* note 13.

⁵⁹ See, e.g., MOORE, *supra* note 1, at 87-88 ("Punishment of the guilty is thus for the retributivist an *intrinsic* good, not the merely *instrumental* good that it may be to the [consequentialist]."); see also *supra* note 30 and accompanying text.

⁶⁰ NOZICK, *supra* note 44, at 374.

that are deserved and proportional are intrinsic goods.⁶¹ Since the five-years imprisonment thus far is undeserved and disproportional, it is not an intrinsic good.

Even if we assume *arguendo* that the five-years imprisonment thus far is an intrinsic good, that premise leads to the false conclusion that imprisonment of *only* five years is an intrinsic good. For the five-years imprisonment thus far to be good in itself regardless of what else happens, it must be good even if the prisoner escaped from prison today, received no further punishment, and therefore received only five-years imprisonment. That is, if five years thus far of imprisonment is an intrinsic good, then the prisoner being punished for only five years must also be an intrinsic good. But retributivists themselves would treat punishment of *only* a part of a deserved and proportional punishment as neither an intrinsic good nor justified.⁶² Since the premise that the five years thus far of imprisonment is an intrinsic good generates the false conclusion that imprisonment of only five years for the offender is also an intrinsic good, we might properly reject the premise. And if the offender's punishment thus far is not an intrinsic good, then it cannot be justified under retributivism.

3. Retrospective Outlook

In justifying punishment, retributivism adopts a retrospective outlook.⁶³ Retributivism looks not forward to good future consequences, but rather backward to the crime committed for the source of justifying punishment. Looking backward to the crime committed affords a determination of an offender's desert that is a function of the crime's gravity and the degree of culpability with which the crime was committed.⁶⁴ The offender's desert is such that the punishment proportional to that desert is twenty-years imprisonment. Thus, a retrospective outlook is only helpful in justifying the whole twenty-years imprisonment, but not the five-years imprisonment thus far.

⁶¹ Since "the guilty receiving their just deserts is an intrinsic good," MOORE, *supra* note 1, at 157, and "retributivists . . . are committed to the principle that punishment should be graded in proportion to desert," *id.* at 88, only punishments that are proportional are intrinsic goods.

⁶² The punishment of only five-years imprisonment is clearly unjustified under retributivism because the stipulated proportional, deserved punishment for our hypothetical offender's crime is twenty-years imprisonment.

⁶³ See *supra* note 46 and accompanying text.

⁶⁴ See *supra* note 57 and accompanying text.

4. *Punishment of Only a Part Unjustified*

Whatever argument that might be advanced to justify the five-years imprisonment *thus far* must not be so strong as to also justify punishment of *only* five-years imprisonment. A punishment of only five-years imprisonment is clearly unjustified under retributivism for the offender's crime because it is disproportional to the offender's desert. Thus, any asserted justification of the five-years imprisonment *thus far* that also justifies punishment of only five-years imprisonment would be untenable.

5. *Explanation of Part Thus Far/Only a Part Distinction*

Since punishment of *only* five-years imprisonment for the offender is clearly unjustified under retributivism,⁶⁵ any attempt at a justification for the five-years imprisonment *thus far* must explain the difference supporting their differential treatment under retributivism. The only apparent difference is that punishment of only five-years imprisonment precludes the possibility of the offender being punished the full twenty-years imprisonment. In contrast, punishment of five-years imprisonment *thus far* affords that possibility. But justifying the five-years imprisonment *thus far*, based on this difference, is justifying it prospectively, by the possible future effect or consequence that it will lead to twenty-years imprisonment. The five-years imprisonment *thus far* would then not be an intrinsic good, as required by retributivism,⁶⁶ but only an instrumental good.⁶⁷ Such a justification is consequentialist and thereby unavailable to retributivism.⁶⁸ Since the only apparent difference between punishing only five years versus five years *thus far* is that which supports a consequentialist justification, retributivism lacks a satisfactory basis for explaining why punishment of only five years is unjustified and why punishment of five years *thus far* is justified.

6. *Punishment of Remainder of Sentence Justified*

Whatever argument that might be advanced to justify the five-years imprisonment *thus far* must not render unjustified the remaining fifteen years on the offender's proportional sentence of twenty-years imprisonment. To illustrate this condition, assume *arguendo* that the five-years imprisonment *thus far* is justified. Since it is justified, and the only punishment which retributivism justifies is deserved and proportional punishment, then there

⁶⁵ See *supra* note 62.

⁶⁶ See *supra* notes 45, 59–60, and accompanying text.

⁶⁷ See *supra* note 44 and accompanying text.

⁶⁸ See *supra* notes 44, 59, and accompanying text.

would be no justification for punishing the offender the remaining fifteen years. That is, if the five-years imprisonment thus far is justified, then it must be deserved and proportional. But if it is deserved and proportional—no more and no less—, then any further imprisonment beyond the five years thus far would be undeserved and disproportional. As a result, a justification for the five-years imprisonment thus far may foreclose retributivism from being able to justify the stipulated deserved and proportional punishment of twenty-years imprisonment. A justification for the five-years imprisonment thus far might thereby collapse into a justification for a punishment of only five-years imprisonment. Any attempted justification under retributivism for a constituent part of a temporal term of imprisonment that precluded justifying the whole punishment would be an unsatisfactory solution.

B. *Other Theories' Justifications*

Since there is no apparent retributivist justification for a constituent part of a temporal term of imprisonment, considering how the other principal theories of punishment do justify such punishment might be instructive. But the ways in which these other theories do justify parts of temporal terms of imprisonment are unavailable to retributivism and raise further conditions for a satisfactory retributivist justification to meet.

1. *Consequentialism*

Let us stipulate that twenty-years imprisonment for the offender's crime is also the punishment that would be justified under consequentialism.⁶⁹ Unlike retributivism, consequentialism can justify the five-years imprisonment thus far if the future good consequences generated by punishing the offender for twenty years outweigh any bad consequences incurred by punishing thus far for five years. This consequentialist justification, however, is unavailable to retributivism. As Antony Duff explains, retributivism "justifies punishment in terms not of its contingently beneficial effects but of its *intrinsic* justice as a response to crime; the justificatory relationship holds between present punishment and past crime, not between present punishment and future effects."⁷⁰ Thus, under retributivism, the future, contingent effects of the present punishment of five-years imprisonment thus far cannot be the basis for justifying the five-years

⁶⁹ Although the degree of punishment justified by retributivism and consequentialism for a given crime will perhaps infrequently coincide, stipulating that the same punishment would be justified by both theories facilitates a clear comparison of the two theories of punishment.

⁷⁰ DUFF, *supra* note 37, at 19–20.

imprisonment thus far.⁷¹ Furthermore, the consequentialist justification conceives of the five-years punishment thus far as an instrumental good, rather than the intrinsic good required by retributivism,⁷² because it possibly leads to the good consequences of the offender being punished for twenty years.

2. H.L.A. Hart's Mixed Theory

To bridge the impasse between retributivism and consequentialism, so-called "mixed" theories of punishment combine elements of both consequentialism and retributivism.⁷³ One of the most influential mixed theories is H.L.A. Hart's.⁷⁴ In setting the amount or degree of punishment, Hart forges a compromise between consequentialism and retributivism.⁷⁵ Deterrence concerns determine the lower limit, or floor, and retributivist

⁷¹ For a discussion of various ways in which some retributivists have found the use of non-contingent consequences to be relevant in justifying punishment, see *infra* Part III.B. But as will be demonstrated, the use of these special types of consequences does not furnish a satisfactory solution to retributivism's inability to justify the infliction of punishments featuring temporal terms of imprisonment.

⁷² See *supra* notes 44-45, 59, and accompanying text.

⁷³ Cesare Beccaria's landmark *On Crimes and Punishments* in 1764 was perhaps the first comprehensive mixed theory of punishment. Rather than distinguishing between the justice of punishment and its good consequences, Beccaria conceives them as inextricably intertwined: "[T]he more just punishments are, the more sacred and inviolable is personal security" CESARE BECCARIA, *ON CRIMES AND PUNISHMENTS* 8 (David Young trans., Hackett Pub. Co. 1986) (1764). Assuming that "[i]t is better to prevent crimes than to punish them," *id.* at 74, Beccaria concludes that "a punishment for a crime cannot be deemed truly just . . . unless the laws have adopted the best possible means . . . to prevent that crime." *Id.* at 60.

⁷⁴ Hart's account may be the most influential mixed theory in the theoretical literature. For a discussion of the mixed theory most influential in sentencing codes and guidelines, see *infra* Part IV.A. For other notable mixed theories, see EWING, *supra* note 34, at 300 (justifying punishment by the good consequence of preventing crime by expressing moral condemnation, but only to the extent deserved); Quinton, *supra* note 15, at 12-15 (maintaining that consequentialist concerns justify punishment while retributivism provides the definition of punishment); Rawls, *supra* note 1, at 5 (advocating a rule-utilitarian approach in which the justification of punishment institutions is deterrence, but the rules employed by the punishment institutions are retributive).

⁷⁵ Hart conceptualizes consequentialism and retributivism as furnishing different answers to different questions. As to the question of what justifies the general practice and institutions of punishment (the "General Justifying Aim"), consequentialism supplies the answer. HART, *supra* note 5, at 8-11. As to who may justifiably be punished ("Distribution"), retributivism supplies the answer—"only an offender for an offence." *Id.* at 11-13.

considerations determine the upper limit, or ceiling. That is, an offender should be punished as much as is necessary to sufficiently deter crime, but no more than what the offender deserves and is proportional to the crime.⁷⁶ Like consequentialism, but unlike retributivism, Hart's mixed theory can justify the five-years imprisonment thus far. If the good consequences generated by twenty-years imprisonment outweigh any bad consequences incurred by five-years imprisonment thus far, the consequentialist component of Hart's mixed theory is satisfied. And because the five-years imprisonment thus far is less than the proportional twenty-years imprisonment, the retributivist component of the mixed theory is satisfied.

But this mixed theory's mode of justification—relying on the future consequences of punishment—is unavailable to retributivism. The unavailability of the modes of justification in both Hart's mixed theory and consequentialism suggest another condition, in addition to the six enumerated above, to a retributivist justification of the five-years imprisonment thus far: (7) to avoid retributivism collapsing into consequentialism or a mixed approach, any attempted retributivist justification must not resort to the good contingent consequences of the offender being punished for twenty years.

3. Negative Retributivism

In merely establishing a ceiling or limit on the amount of punishment that may be inflicted, the retributivist component in Hart's mixed theory has been termed "negative retributivism."⁷⁷ In contrast, retributivism (or positive retributivism)⁷⁸ requires not merely that punishment be equal to or less than that which is proportional to the crime, but rather that it be no more and no less.⁷⁹ Because negative retributivism merely provides a ceiling on the

⁷⁶ *Id.* at 25, 79–80, 235–37.

⁷⁷ The term "negative retributivism" may have originated in John L. Mackie, *Morality and the Retributive Emotions*, 1 CRIM. JUST. ETHICS 3, 4 (1982). Hart uses the term "weakened" retributivism. HART, *supra* note 5, at 233.

⁷⁸ Since most, if not all, retributivists use the simple term retributivism to mean positive retributivism, this Article will also use the term retributivism to mean positive retributivism, unless otherwise specified. See, e.g., Michael Moore, *Punishment*, in THE CAMBRIDGE DICTIONARY OF PHILOSOPHY 759, 759 (Robert Audi ed., 2d ed. 1999) ("Retributivism is also not the view (sometimes called 'weak' or 'negative' retributivism) that *only* the deserving are to be punished, for desert on such a view typically operates only as a limiting and not as a justifying condition of punishment."); see also MOORE, *supra* note 1, at 88.

⁷⁹ See *supra* note 13 and accompanying text. So while positive retributivism requires that an offender be punished no more than, and no less than, the fullest extent of her just deserts, John L. Mackie, *Retributivism: A Test Case for Ethical Objectivity*, in PHILOSOPHY OF LAW 622, 623 (Joel Feinberg & Hyman Gross eds., 2d ed. 1986) ("[A]

amount of punishment but fails to supply an affirmative reason to punish an offender at all, negative retributivism is generally employed within a mixed theory and rarely, if ever, employed as a complete justification for punishment.⁸⁰ As Duff explains, negative retributivism “clearly provides no complete justification . . . for it tells us that we *may* punish the guilty (their punishment is not unjust), but not that or why we *should* punish them.”⁸¹ Moreover, in justifying punishment that is equal to or less than an offender’s proportional and deserved punishment, negative retributivism would find permissible no punishment at all—zero punishment satisfies negative retributivism’s measure of equal to or less than the deserved and proportional punishment.⁸²

Under negative retributivism considered as a stand-alone theory of punishment, the offender’s five-years imprisonment thus far is permissible. The five-years imprisonment thus far satisfies negative retributivism’s criterion of punishment being (equal to or) less than the deserved and proportional twenty-years imprisonment. But as discussed above, negative retributivism standing alone, without a consequentialist component, fails to supply an affirmative reason or justification why someone should be punished at all.⁸³ In addition, negative retributivism would find permissible the disproportional punishment of *only* five-years imprisonment.⁸⁴ Thus, adopting negative retributivism’s non-affirmative “justification” of the five-years imprisonment thus far is an untenable solution for retributivism. This

crime of a certain degree of wrongness positively calls for a proportionate penalty.”), negative retributivism requires that an offender be punished less than, or equal to, her just deserts. *Id.* (“[E]ven if someone is guilty of a crime it is wrong to punish him more severely than is proportional to the crime.”). Mackie refers to this as the “quantitative variant of negative retributivism.” *Id.*

⁸⁰ See MOORE, *supra* note 1, at 88 (“Other reasons—typically, crime prevention reasons—must be added to moral desert, in this view [negative retributivism], for punishment to be justified.”); David Dolinko, *Some Thoughts About Retributivism*, 101 ETHICS 537, 539–44 (1991); Mackie, *supra* note 79, at 679 (“Even negative retributivism, however, is not without its problems . . . [it does] not say that wrong acts are positively a reason *for* imposing penalties”); Moore, *supra* note 78, at 759 (noting that negative retributivism “operates only as a limiting and not as a justifying condition of punishment”).

⁸¹ Duff, *supra* note 40, at 7 (citation omitted).

⁸² See, e.g., PRIMORATZ, *supra* note 2, at 141, 146 (explaining that the negative retributivism component of Hart’s mixed theory sets only an upper limit which may not be exceeded but does not set a lower limit below which the amount or degree of punishment may not pass).

⁸³ See *supra* notes 80–82 and accompanying text.

⁸⁴ Negative retributivism’s criterion of punishment equal to or less than the proportional punishment would find permissible for our hypothetical offender both (i) five-years imprisonment thus far, and (ii) only five-years imprisonment.

suggests an additional condition for a satisfactory solution: (8) to avoid retributivism collapsing into negative retributivism, the five-years imprisonment thus far must not be justified under retributivism on the basis that it is less than the proportional, deserved, and justified twenty-years imprisonment.

IV. ATTEMPTS AT A RETRIBUTIVIST SOLUTION

This Part examines five possible, but ultimately unsuccessful, solutions for retributivism. Some of the attempted solutions are unpersuasive on their face. Others, while satisfying one or more of the eight conditions or criteria for an adequate justification, fail to satisfy them all.

A. *The Meaning of Whole Punishment Includes Its Parts*

One might claim that included in the meaning of a whole punishment is any necessary part of that whole punishment.⁸⁵ For example, part of the meaning of punishing a culpable wrongdoer with twenty-years imprisonment is punishing her for five years, ten years, fifteen years, and so on. If twenty-years imprisonment is justified under retributivism, and if the five years thus far of imprisonment is part of the meaning of that justified whole punishment, then the five years thus far of imprisonment must also be justified.

Although intuitively appealing, the argument is ultimately unpersuasive for a number of reasons. First, the claim is essentially a reformulated version of the discredited argument of the greater includes the lesser.⁸⁶ Second, even if distinct from the greater/lesser doctrine, to assume that what is true of the whole is necessarily true of a part of that whole is to commit the "fallacy of division."⁸⁷ The following example illustrates the fallacy: "This machine is

⁸⁵ I am indebted to John Gardner and Ekow Yankah for suggesting various aspects of this argument.

⁸⁶ For evidence of the similarity of the two arguments, see Michael Herz, *Justice Byron White and the Argument that the Greater Includes the Lesser*, 1994 BYU L. REV. 227, 239 (1994) (commenting that "[e]ven in the law the whole generally includes its parts" as one of the greater/lesser doctrine's "purest expressions") (quoting *Western Union Tel. Co. v. Kansas ex rel. Coleman*, 216 U.S. 1, 53 (1910)) (Holmes, J., dissenting). No argument in this Article, however, hinges on whether the two principles are identical or distinct.

⁸⁷ See, e.g., John L. Mackie, *Fallacies*, in 3 *ENCYCLOPEDIA OF PHILOSOPHY*, *supra* note 2, at 169, 172–73 ("[A]ttempts to argue from the premise that something is true of some whole, or of some class considered collectively, to the conclusion that the same is true of the parts of the whole, or of the class considered distributively (that is, of each of its members)."); Douglas Walton, *Informal Fallacy*, in *THE CAMBRIDGE DICTIONARY OF PHILOSOPHY*, *supra* note 78, at 431, 432 ("The *fallacy of division* is . . . the error of

heavy. Therefore, all the parts of this machine are heavy.”⁸⁸ Of course, there are numerous heavy machines, for example, an automobile, which contain light parts, for example, a radiator cap or air filter. While it is not *necessarily* the case that what is true of the whole is also true of the part, what is true of the whole *may* be true of the part.⁸⁹ For example, a heavy machine like an automobile may contain heavy parts, for example, an engine. As a result, to make the case that what is true of a whole is also true of a part of that whole requires further argument, “adequate reason . . . evidence [, or] . . . must be explained.”⁹⁰

No such further argument or explanation is apparent. If punishment *X* is the deserved and proportional punishment for an offender’s crime (or at the low end of a range of what is deserved and proportional), then a part of *X* (which is necessarily less than *X*) would necessarily be undeserved and disproportional. As a result, if whole punishment *X* is justified, then a punishment of part of *X* would necessarily be unjustified under retributivism. Rather than being able to rely on the principle of division—that what is true of the whole is necessarily true of the part—retributivism illustrates why the principle is indeed fallacious.⁹¹

Third, even if the five years imprisonment thus far is included within the meaning of twenty-years imprisonment, as the proposed solution maintains,

arguing from a property of the whole to a property of its parts The problem is that the property possessed by the whole need not transfer to the parts.”). For discussion of the fallacy of division as applied to legal contexts as well as in relation to the doctrine of the greater includes the lesser, see Herz, *supra* note 86, at 242–49.

⁸⁸ DOUGLAS N. WALTON, *INFORMAL LOGIC: A HANDBOOK FOR CRITICAL ARGUMENTATION* 130 (1989). For additional examples of reasoning committing the fallacy of division, see STEPHEN TOULMIN ET AL., *AN INTRODUCTION TO REASONING* 171–73 (2d ed. 1984) (supplying the example that if table salt is harmless to ingest, then its constituent parts—sodium and chlorine—are necessarily also harmless to ingest); WALTON, *supra* (“American Indians have reservations in every state. The Navajo are American Indians. Therefore, the Navajo have reservations in every state.”); Mackie, *supra* note 87, at 173.

⁸⁹ WALTON, *supra* note 88, at 130–31 (noting that forms of argument using the principle of division “are not all fallacious”); Herz, *supra* note 86, at 243 (“[T]he parts do not necessarily [but may] share the characteristics of the whole.”); Mackie, *supra* note 87, at 173 (indicating that what is true of the whole is also true of the parts “may be possible”); Walton, *supra* note 87, at 432 (“[T]he property possessed by the whole need not [but may] transfer to the parts.”).

⁹⁰ Mackie, *supra* note 87, at 173.

⁹¹ Neither the greater/lesser doctrine nor the principle of division is helpful to retributivism in specifying a justification of the five-years imprisonment thus far, because they conflate what retributivism must keep distinct. Otherwise, the justifiability of a proportional (greater or whole) punishment would entail the justifiability of a disproportional (lesser or part) punishment. Furthermore, retributivism would collapse into negative retributivism.

it still does not justify the five-years imprisonment thus far. The proposed solution fails to satisfy all of the eight enumerated conditions for a retributivist justification.⁹² For example, the proposed solution fails to explain how the five-years imprisonment thus far, even if included within the meaning of the whole punishment, is deserved, proportional, and an intrinsic good. And even if the prisoner's punishment thus far somehow was construed to be deserved and proportional, the proposed solution fails to explain how any further imprisonment beyond the five-years imprisonment thus far (for example, the remaining fifteen-years imprisonment) also could be deserved and proportional. Thus, the proposed solution fails.

B. Conceptual Consequences

Although retributivists generally eschew and criticize the use of consequences to justify punishment,⁹³ some retributivists contend that special types of consequences may be utilized without collapsing into consequentialism.⁹⁴ These special types of consequences—conceptual, logical, or abstract—are purportedly distinguishable from the factual or contingent consequences utilized by consequentialism. Factual or contingent consequences may or may not occur, tend to be of a material nature, and are subject to empirical verification.⁹⁵ Examples include deterrence, rehabilitation and, in general, crime prevention.⁹⁶ Such consequences are contingent because punishment will not invariably and necessarily generate them; a given punishment may or may not, for example, deter crime. The conceptual consequences that retributivism purportedly may utilize to justify punishment are those which logically or necessarily follow from punishment,

⁹² See *supra* Parts II.A.1–6 and II.B. The proposed solution, however, does have the virtue of satisfying at least one of the eight conditions. It does provide somewhat of an explanation as to how retributivism might treat differently five-years imprisonment thus far as opposed to only five-years imprisonment. See *supra* Part II.A.5. While imprisonment of five years thus far is arguably included within the meaning of twenty-years imprisonment, punishment of only five-years imprisonment is not. Since the prisoner receiving only five-years imprisonment precludes the prisoner receiving twenty-years imprisonment, punishment of only five-years imprisonment is inconsistent with the meaning of twenty-years imprisonment.

⁹³ See *supra* note 41 and accompanying text.

⁹⁴ See, e.g., DUFF, *supra* note 6, at 7; Duff, *supra* note 40, at 5–6; George P. Fletcher, *Punishment and Responsibility*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY, *supra* note 34, at 514, 516.

⁹⁵ DUFF, *supra* note 6, at 7; Duff, *supra* note 40, at 5–6; Fletcher, *supra* note 94, at 516.

⁹⁶ See *supra* note 38 and accompanying text.

are abstract, and are not subject to empirical verification.⁹⁷ Examples include avoiding "bloodguilt" and society's complicity with the crime,⁹⁸ annulling or negating the crime,⁹⁹ effecting "a connection with correct values for those who have flouted them,"¹⁰⁰ and "restor[ing] the equilibrium of benefits and burdens."¹⁰¹ These consequences are purportedly non-contingent because they are claimed to invariably and necessarily follow from retributive punishment.

Can retributivism justify the infliction of temporal terms of imprisonment by resort to conceptual consequences?¹⁰² The good consequence of punishing the offender for five years thus far is that it allows for the possible attainment of the intrinsic good of the offender being punished for twenty years. Since whether the offender serves her full term may or may not happen—the offender may escape from, or die in, prison prior to the completion of her full sentence—the consequence sought to be promoted is contingent. It is not a conceptual or logical consequence because the offender serving twenty years will not necessarily or logically occur as a result of the offender thus far serving five years of her term. Thus, the consequences by which retributivism might justify the five years thus far are not conceptual, but rather contingent. Since retributivism's use of contingent consequences would collapse retributivism into consequentialism,¹⁰³ the proposed solution fails.

C. *The Doctrine of Double Effect*

An oft-invoked argument to insulate retributivism from criticism is some variant of St. Thomas Aquinas' doctrine of double effect.¹⁰⁴ Simply put, an

⁹⁷ DUFF, *supra* note 6, at 7; Duff, *supra* note 40, at 5–6; Fletcher, *supra* note 94, at 516.

⁹⁸ KANT, *supra* note 1, at 142.

⁹⁹ HEGEL, *supra* note 1, § 97 at 123.

¹⁰⁰ NOZICK, *supra* note 44, at 384.

¹⁰¹ MORRIS, *supra* note 46, at 34.

¹⁰² For the view that various versions of retributivism incorporating conceptual consequences collapse into consequentialism, see TEN, *supra* note 35, at 44–46 (noting that Nozick's theory, *see supra* text accompanying note 100, collapses into consequentialism); John Cottingham, *Varieties of Retribution*, 29 PHIL Q. 238, 243–44 (1979) (arguing that Kant's theory, *see supra* text accompanying note 98, is justifying punishment by the avoidance of the bad consequences of not punishing); Quinton, *supra* note 15, at 7–8 (contending that Hegel's annulment doctrine, *see supra* note 39 and text accompanying note 99, justifies "punishment by its effects, by the desirable future consequences which it brings about").

¹⁰³ *See supra* notes 16, 41.

¹⁰⁴ 3 ST. THOMAS AQUINAS, SUMMA THEOLOGICA 1465 (Fathers of the English

act, which is not wrong in itself and that has two effects or consequences—one bad and one good—is permissible if the good effect is intended and the bad effect, while foreseen, is neither intended as an end in itself nor as a means to producing the good effect, and the good effect does not arise through the bad effect.¹⁰⁵ For a classic example, in “Strategic Bombing,” suppose a U.S. bomber pilot is assigned the task of blowing up a munitions plant in Nazi Germany during WWII.¹⁰⁶ While doing so may be a legitimate act of war, the destruction of the plant will most likely kill a number of innocent civilians nearby. According to the doctrine of double effect, if the act of bombing is not wrong in itself it may be permissible since the good effect—undermining Nazi Germany’s ability to manufacture weapons—is intended and the bad effect—the death of the innocent civilians—is neither intended as an end nor as a means to accomplish the good effect, and the good effect does not arise through the bad effect.¹⁰⁷ That is, the good effect of the destruction of the munitions plant does not arise through the bad effect of the death of the innocent civilians.

Contrast “Strategic Bombing” with the following example termed “Terror Bombing.”¹⁰⁸ Suppose a U.S. bomber pilot is assigned the task of bombing civilian targets so as to terrorize innocent civilians and undermine Nazi Germany’s will to continue waging war. The act of such bombing has two effects—one good and one bad. The intended good effect is undermining Nazi Germany’s will to wage war. The bad effect—the death of innocent civilians—is not only intended as a means to the good effect but also the

Dominican Province trans., Benziger Bros, Inc 1947) (1485).

¹⁰⁵ For neutral accounts of the doctrine, see SIMON BLACKBURN, OXFORD DICTIONARY OF PHILOSOPHY 109 (1996) (“[A]n action is permissible if (i) the action is not wrong in itself, (ii) the bad consequence is not that which is intended, (iii) the good is not itself a result of the bad consequence, and (iv) the two consequences are commensurate.”); Philip E. Devine, *Principle of Double Effect*, in THE CAMBRIDGE DICTIONARY OF PHILOSOPHY, *supra* note 78, at 737, 738 (“[O]ne may produce a forbidden effect, provided (1) one’s action also had a good effect, (2) one did not seek the bad effect as an end or as a means, (3) one did not produce the good effect through the bad effect, and (4) the good effect was important enough to outweigh the bad one.”).

The fourth clause or condition in each of the above formulations is controversial because it appears to involve consequentialist reasoning. Mirko Bagoric & Kumar Amarasekara, *The Errors of Retributivism*, 24 MELB. U. L. REV. 124, 146–47 (2000). Warren Quinn is the doctrine’s “most sophisticated and resourceful recent exponent.” Dolinko, *supra* note 3, at 1634. Quinn argues that the “most important and plausible” version of the doctrine is found in its first three conditions and ignores the more controversial fourth condition. Warren S. Quinn, *Actions, Intentions, and Consequences: The Doctrine of Double Effect*, 18 PHIL. & PUB. AFF. 334, 334 n.3 (1989).

¹⁰⁶ Judith Jarvis Thomson, *Self-Defense*, 20 PHIL. & PUB. AFF. 283, 292–96 (1991).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

good effect arises through the bad effect. Thus, such bombing would not be permissible under the doctrine of double effect.

While the doctrine itself, as well as retributivists' reliance on it, is heavily criticized,¹⁰⁹ retributivists might attempt to employ the doctrine to render permissible the five-years punishment thus far. The act of inflicting the temporal term of imprisonment on the offender has two effects: the intended good effect is that the offender receives her full, proportional twenty-years imprisonment and the bad effect is that the offender first receives the undeserved, disproportional five-years imprisonment thus far. But the doctrine of double effect does not apply; at least two of the doctrine's conditions are not satisfied. First, the bad effect is intended as a means to the good effect. In inflicting the offender's punishment, it is intended that the offender first serve five-years imprisonment en route to serving twenty-years imprisonment. Second, the good effect arises through the bad effect. In order for the offender to serve twenty-years imprisonment, the offender must necessarily first serve five-years imprisonment. The act of inflicting the temporal term of imprisonment on the offender is analogous to "Terror Bombing" in which the bad effect is intended as a means to attaining the good effect and the good effect arises through the bad effect. Since the conditions for the doctrine of double effect to apply are not satisfied with respect to the punishment of the offender, the doctrine fails to supply a solution.¹¹⁰

¹⁰⁹ For general criticisms of the doctrine of double effect, see BLACKBURN, *supra* note 105, at 109; PHILIPPA FOOT, VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY 19 (1978); Dolinko, *supra* note 3, at 1634; Thomson, *supra* note 106, at 292-96. For criticisms of the doctrine's use by retributivists, see Bagoric & Amarasekara, *supra* note 105, at 144-47; Russell L. Christopher, *Detering Retributivism: The Injustice of 'Just' Punishment*, 96 NW. U. L. REV. 843, 900-17 (2002); Dolinko, *supra* note 3, at 1632-35; Kaplow & Shavell, *supra* note 19, at 1273-77 & n.757; Richard O. Lempert, *Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment*, 79 MICH. L. REV. 1177, 1184 (1981); George Schedler, *Can Retributivists Support Legal Punishment?*, 63 MONIST 185, 187-90 (1980). For examples of the doctrine's use by retributivists, see DUFF, *supra* note 6, at 159; MOORE, *supra* note 1, at 158. See also RONALD DWORKIN, A MATTER OF PRINCIPLE 79-89 (1985).

¹¹⁰ There is a further difficulty with utilizing the doctrine of double effect to render permissible the five-years imprisonment thus far. The doctrine's requirement that the act not be wrong in itself is not satisfied. Since while the offender is being punished the punishment is unjustified, the act of punishing her is wrong in itself. While the end-result of twenty-years imprisonment may be justified under retributivism, the act itself is not and thus is wrong.

D. *Justification by Degrees*

In contrast to a binary conception of retributivism's justification of punishment in which punishment is either justified or unjustified, one might argue that there are degrees of justification. As such, our offender's serving (thus far) five years of her twenty-year term satisfies, and is justified by, retributivism *to a degree*. As an offender serves more and more of her term of imprisonment, her punishment is partially justified to a greater and greater degree until she completes her term of imprisonment, upon which her punishment is fully justified.

The proposed solution is unpersuasive for three reasons. First, so far as I know, there is no existing account of retributivism featuring degrees of justification.¹¹¹ Second, even if the punishment of the offender at the various stages of her prison term may be said to be partially justified to a lesser or greater degree, the punishment nonetheless remains unjustified to a lesser or greater degree. That is, if there are degrees of justified punishment under retributivism, then there must also be degrees of *unjustified* punishment. As a result, retributivism cannot entirely justify the infliction of parts of temporal terms of imprisonment.

Third, and most important, even assuming *arguendo* that some degree of justification might suffice for complete justification, the early stages of a temporal term of imprisonment will nonetheless be overwhelmingly unjustified and only very slightly justified. We might conceptualize the degree of justification at the five-year stage of a twenty-year sentence as 25% justified/75% unjustified, at the ten-year stage 50% justified/50% unjustified, at the fifteen-year stage 75% justified/25% unjustified, and at completion of the twenty years the punishment is 100% justified/0% unjustified. Perhaps at some point when the punishment passes a threshold¹¹² at which the

¹¹¹ While there may be some latitude in what constitutes a deserved and proportional punishment, this does not entail degrees of justification. Within the range of what is considered deserved and proportional, a punishment is justified. Outside the range of what is deemed deserved and proportional, a punishment is undeserved, disproportional, and unjustified. Therefore, even though there may be latitude in what is a deserved and proportional punishment, a punishment is either deserved and proportional or undeserved and disproportional. As a result, a punishment is either justified or not justified.

¹¹² Even if there may be degrees of justification under retributivism, the decision to punish or not is binary—either punish or not punish. Thus, if there are degrees of justification, there must be some measure or standard that correlates degrees of justification with whether punishment may justifiably be inflicted or not. Some threshold would have to be established at which a degree of justification at or above the threshold would support punishment and a degree of justification below the threshold that would not support punishment. Wherever the threshold was set, there would necessarily be a

punishment is more justified than unjustified, justification by degree might suffice for complete justification. But prior to the threshold, at the early stages of the twenty-year sentence, the punishment is only very slightly justified and overwhelmingly unjustified. For example, at the one-year stage the punishment might be only 5% justified and 95% unjustified. A retributivist could hardly maintain that a punishment that was 95% unjustified sufficed to render the punishment justified. Because any temporal term of imprisonment will necessarily start out only slightly justified and overwhelmingly unjustified, and passing through the early stages is necessary to reach the later stages, a punishment can never reach the later stages, in which it will be mostly justified, without first passing through the early stages, in which it will be overwhelmingly unjustified. As a result, a degrees of justification approach fails to provide a solution.

E. Narrowing the Scope of Retributivism's Justification

This section considers how retributivists might concede that retributivism is unable to justify the infliction of temporal terms of imprisonment but nonetheless argue that retributivism is not meant to justify such punishment. First, retributivism may only be meant to justify the articulation or announcement of an offender's just sentence, but not its infliction. Second, retributivism's justification may only extend to the end-result of the completed punishment, but not the actual infliction of punishment. Third, punishment might be defined such that inflicting constituent parts of sentences of temporal terms of imprisonment do not constitute punishment, and thus retributivism, as a theory of punishment, need not justify it. However, none of the attempts to avoid the problem of justifying temporal terms of imprisonment by narrowing the scope of retributivism's justification supply a satisfactory solution.

1. Retributivism Justifies Only the Sentence of Punishment

A retributivist might argue that retributivism is not meant to justify the actual infliction of punishment or suffering of the offender, but only the sentence of punishment. In other words, retributivism is only meant to justify some articulation of the deserved punishment, but not the actual infliction of the punishment itself.¹¹³ Retributivism would thereby be satisfied and the

point in the early stages of a term of punishment (where the punishment would be less than 1% justified and more than 99% unjustified) that would presumably fall below the threshold. Since a degrees of justification approach would always find the early stages of a temporal term of punishment to be overwhelmingly unjustified, it is not a satisfactory solution.

¹¹³ For a discussion of the distinction between the articulation of the sentence and

good of retributivism attained merely by the court announcing the punishment or the act of sentencing the offender to punishment, which reflects what the offender deserves. Whether the offender actually serves out the sentence or actually is punished would thereby be irrelevant to retributivism.

Of course, this possible solution is unsatisfactory. First, punishing based on an offender's just deserts does not merely include imposing a sentence of imprisonment that the offender does not have to serve. When retributivism speaks of culpable wrongdoers deserving suffering it does not merely mean that an offender will be informed that he or she will suffer a certain punishment, but that the actual punishment will never occur.¹¹⁴ Second, it suggests that retributivism would be satisfied if an offender received a fake sentence that the authorities would never require that the offender actually serve. The authorities would merely pretend that the offender was actually serving the sentence. Retributivists have criticized consequential and mixed theories of punishment based on deterrence for justifying similar faked sentences that are never served.¹¹⁵ Under these theories, the good of deterrence may be attained without the offender actually serving the sentence

the actual infliction of the punishment, see Markus Dirk Dubber, *The Pain of Punishment*, 44 BUFF. L. REV. 545, 555–61 (1996) (explaining that justifying punishment requires justifying each of “its constituent aspects—threat, imposition [articulation of the sentence], and infliction”).

¹¹⁴ Cf. Hampton, *supra* note 13, at 1686–87. In viewing retributivism as vindicating the value of the victim, Jean Hampton considers how a farmer who killed a farmhand and the farmhand's four sons in a particularly degrading way should be punished. Since the farmer did not merely express in words the diminishment of the victims' worth, merely announcing or articulating the farmer's guilt and deserved punishment is insufficient. Hampton suggests that to vindicate the victims the punishment of the farmer must constitute more than mere words:

Re-establishment of the acknowledgment of the victims's worth is normally not accomplished by the mere verbal or written assertion of the equality of worth of wrongdoer and victim. For a judge or jury merely to announce, after reviewing the facts of the farmer's murder of the farmhand and his sons, that he is guilty of murder and that they were his equal in value, is to accomplish virtually nothing. The farmer, by his action, did not just “say” that these men were worthless relative to him, but also sought to *make* them into nothing by fashioning events that purported to establish their extreme degradation. . . . This representation of degradation requires more than just a few idle remarks to deny. When we face actions that not merely express the message that a person is degraded relative to the wrongdoer, but also try to establish that degradation, we are morally required to respond by trying to remake the world in a way that denies what the wrongdoer's events have attempted to establish, thereby lowering the wrongdoer, elevating the victim, and annulling the act of diminishment.

Id.

¹¹⁵ MOORE, *supra* note 1, at 100–02; PRIMORATZ, *supra* note 2, at 42–43.

as long as other members of society believe that the offender is in fact being punished.¹¹⁶ Moore concludes that a theory that would justify only the announcement of a sentence or punishment, but not the actual serving of the sentence, is untenable.¹¹⁷ Retributivism then would suffer from the same failing by which retributivists have condemned consequentialism and mixed theories. Third, the actual infliction of punishment, not the articulation of the sentence, "presents the most pressing justificatory challenge,"¹¹⁸ and is "the crucial issue."¹¹⁹ As a result, justifying only the sentence, or some articulation of punishment, but not the actual infliction of punishment, is not a satisfactory solution for retributivism.

¹¹⁶ MOORE, *supra* note 1, at 100–01. Consequentialists readily acknowledge that to achieve general deterrence, the appearance or publicization of punishment is crucial. Actual punishment, without society's awareness, generates no general deterrent effect. See BENTHAM, *supra* note 35, at 192 ("Punishment cannot act any farther than in as far as the idea of it, and of its connection with the offence, is present in the mind. The idea of it, if not present, cannot act at all; and then the punishment itself must be *inefficacious*."). Without the publicizing of imposed punishments, the general deterrent effect will be minimized:

If delinquents were constantly punished for their offences, and nobody else knew of it, it is evident that . . . there would be a great deal of mischief done, and not the least particle of good The punishment would befall every offender as an unforeseen evil. It would never have been present to his mind to deter him from the commission of crime. It would serve as an example to no one.

Bentham, *supra* note 38, at 399. Apparent punishment, however, even if without actual punishment, does provide general deterrence:

It is the idea only of the punishment (or, in other words, the *apparent* punishment) that really acts upon the mind; the punishment itself (the *real* punishment) acts not any farther than as giving rise to that idea. It is the apparent punishment, therefore, that does all the service, I mean in the way of example, which is the principal object.

BENTHAM, *supra* note 35, at 193 (citation omitted). Actual punishment serves only to produce apparent punishment. Bentham, *supra* note 38, at 398 ("Ought any real punishments to be inflicted? most certainly. Why? for the sake of producing the *appearance* of it."). Bentham declares that faked punishment is preferable to actual punishment if faked punishment would produce the same deterrent effect: "If hanging a man *in effigy* would produce the same salutary impression of terror upon the minds of the people, it would be folly or cruelty ever to hang a man *in person*." *Id.* However, once the public found out about faked punishments, the deterrent effect would be lost. Given the prospect of the public inevitably discovering faked punishments, consequentialism perhaps would no longer justify faked punishments.

¹¹⁷ MOORE, *supra* note 1, at 101–02.

¹¹⁸ Dubber, *supra* note 113, at 555.

¹¹⁹ *Id.* at 559.

2. Retributivism Justifies Only the End-Result of Punishment

It might be argued that retributivism is not meant to justify the actual infliction of punishment, but rather only the end-result of punishment. The argument is unpersuasive for a number of reasons. First, it may simply be false. As George Fletcher observes, unlike consequentialism, “[t]he critical feature of a retributive argument is that if it is sound, it justifies punishment as of the moment that the punishment is imposed.”¹²⁰ Thus, retributivism’s justification does not wait until after the punishment has been completed but rather purports to justify punishment from the beginning of its infliction. And unlike consequentialism, under retributivism, “[o]ne need not wait to see whether the predicted good (deterrence, avoiding private vendettas) actually occurs.”¹²¹ Second, if retributivism is only meant to justify the end-result of punishment, retributivism would risk collapse into consequentialism in justifying prospectively by the contingent effects and consequences of punishment.¹²² Retributivist punishment would thereby be an instrumental good rather than an intrinsic good.¹²³ Thus, restricting the scope of retributivism’s justification to the end-result of punishment, but not its actual infliction, is an unsatisfactory solution to retributivism’s difficulty with justifying temporal terms of imprisonment.

3. Restricting Retributivism’s Definition of Punishment

It might be objected that a constituent part of a temporal term of imprisonment does not constitute punishment. As such, retributivism’s inability to justify that which is not punishment is not problematic. For example, while twenty-years imprisonment for our offender’s crime is punishment, and thus must be justified, the five years of imprisonment thus far is not punishment and thus need not be justified. The objection is unpersuasive for a number of reasons.

The argument featured in the objection is an example of what H.L.A. Hart termed a “definitional stop.”¹²⁴ A definitional stop resolves, by an artificial definition, what should be resolved by substantive argument.¹²⁵

¹²⁰ GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* 417 (1978).

¹²¹ *Id.*

¹²² See *supra* notes 16, 41, 46, and accompanying text.

¹²³ For retributivism’s requirement that punishment be an intrinsic, and not an instrumental, good, see *supra* notes 41–45, 59–61, and accompanying text.

¹²⁴ HART, *supra* note 5, at 5.

¹²⁵ For example, Thomas Hobbes defined away the possibility of a retributivist conception of punishment. Hobbes defined punishment in such a way as to exclude from punishment that which does not have a general deterrent effect:

Resolving substantive issues of punishment theory by definitions of punishment would allow, for example, consequentialists to define punishment as only that imposed against actually guilty defendants.¹²⁶ Under that definition, consequentialist theories of punishment would no longer be subject to the retributivist criticism that consequentialism justifies the intentional punishment of innocents. This is because innocents, by that definition, could not be punished.¹²⁷ Definitional stops are generally frowned upon because they define away all the difficult issues without substantively resolving them—Hart declared definitional stops to be impermissible as an “abuse of definition.”¹²⁸ But if a definitional stop is to be used by retributivists to avoid the charge that retributivism cannot justify the infliction of temporal terms of imprisonment, then consequentialists could also employ a definitional stop to avoid the most damning criticism retributivists have levied against consequentialism.¹²⁹

In addition to relying on an artificial definition of punishment that no other theory of punishment would require, the artificial definition fails to supply retributivism with an account of how the offender’s imprisonment is justified. Even if the early stages of a temporal term of imprisonment may be

If the harm inflicted be lesse than the benefit, or contentment that naturally followeth the crime committed, that harm is not within the definition [of punishment]; and is rather the Price, or Redemption, than the Punishment of a Crime: Because it is of the nature of Punishment, to have for end, the disposing of men to obey the Law

THOMAS HOBBS, *LEVIATHAN* 166 (J.M. Dent & Sons 1976) (1651); *see also id.* at 164 (“A Punishment, is an Evill inflicted by publique Authority, on him that hath done, or omitted that which is Judged by the same Authority to be a Transgression of the Law; to the end that the will of men may thereby the better be disposed to obedience.”) (emphasis omitted).

¹²⁶ *See, e.g.,* Quinton, *supra* note 15, at 10 (“The infliction of suffering on a person is only properly described as punishment if that person is guilty. The retributivist thesis, therefore, is not a moral doctrine, but an account of the meaning of the word ‘punishment.’”).

¹²⁷ *See, e.g.,* HOBBS, *supra* note 125, at 168 (“All Punishments of Innocent subjects, be they great or little, are against the Law of Nature: For Punishment is only for Transgression of the Law, and therefore there can be no Punishment of the Innocent.”).

¹²⁸ HART, *supra* note 5, at 5.

¹²⁹ For the view that the most damaging criticism of consequentialism is that it justifies punishment of the innocent, *see, for example,* MOORE, *supra* note 1, at 93 n.19 (“The main problem with the pure utilitarian [consequentialist] theory of punishment is that it potentially sacrifices the innocent in order to achieve a collective good.”); Greenawalt, *supra* note 5, at 1341 (“[T]he most damaging aspect of the [retributivist] attack is that utilitarianism admits the possibility of justified punishment of the innocent.”); Quinton, *supra* note 15, at 9 (observing that retributivists’ “crucial charge is that utilitarians permit the punishment of the innocent”).

defined so as to not constitute punishment, the same problem remains: how can retributivism justify the offender having been in prison for five years thus far? Under the proposed definition of punishment, retributivism cannot and need not justify her imprisonment thus far because it is not punishment and retributivism can only justify punishment. But even if, or perhaps especially if, the offender's incarceration thus far of five years is not punishment, a justification is required for intentionally inflicting the harm, suffering and deprivation encompassing involuntary incarceration.¹³⁰ If retributivism fails to supply a justification, it can no longer ever reach the stage where incarceration results in 'punishment' because it lacks a justification for 'nonpunishing' offenders during the earlier stages. As a result, utilizing a definitional stop to craft an artificial definition of punishment fails to furnish a solution to retributivism's inability to justify temporal terms of imprisonment.

V. SENTENCING THEORY AND PRACTICE

This Part broadens the scope of the difficulty in justifying temporal terms of imprisonment beyond theoretical accounts of retributivism. Examination of the consensus sentencing approach underlying state and federal sentencing codes and guidelines as well as the proposed revisions of The American Law Institute's Model Penal Code Sentencing provisions¹³¹ reveals that any sentencing scheme setting a lower limit or minimum punishment for a given offense by the retributivist principles of desert and proportionality is unable to justify any temporal term of imprisonment for any offender. As a result, this consensus approach may have to be abandoned. In addition, the broader specification of the scope of the problem may provide the conceptual framework for abolishing the widely reviled sentencing practice of mandatory minimums. That any sentencing approach setting the minimum punishment for a given offense by the retributivist principles of desert and proportionality is unable to justify temporal terms of imprisonment undermines the primary rationale for mandatory minimums.

A. *The Consensus Approach*

While retributivism enjoys the mantle of being the leading theoretical justification of punishment,¹³² Norval Morris's mixed theory—variously

¹³⁰ The intentional infliction of harm, suffering and deprivation—regardless of whether it is classified as punishment or not—is *prima facie* wrong and requires justification. See *supra* notes 6, 35, and accompanying text.

¹³¹ See *infra* note 140 and accompanying text.

¹³² See *supra* note 3 and accompanying text.

termed "modified just desert," "limiting retributivism," or, simply, "LR"—is hailed as the "reigning"¹³³ and "consensus"¹³⁴ approach utilized in sentencing codes and guidelines.¹³⁵ Some version of LR is claimed to be the underlying philosophy of "every state sentencing commission that has issued sentencing guidelines"¹³⁶—as many as twenty states—,¹³⁷ the federal sentencing guidelines,¹³⁸ and many international sentencing codes.¹³⁹ LR is also the guiding theory for the proposed revisions of the American Law Institute's Model Penal Code Sentencing provisions.¹⁴⁰

¹³³ Hofer & Allenbaugh, *supra* note 20, at 53 ("[M]odified just desert [or LR] is our nation's reigning sentencing philosophy.").

¹³⁴ Frase, *supra* note 21, at 2.

¹³⁵ For accounts of Morris's LR theory, see MORRIS & TONRY, *supra* note 13, at 84–89; MORRIS, CRIMINAL LAW, *supra* note 4, at 178–209; MORRIS, *supra* note 24, at 58–84; Andrew von Hirsch, *Equality, 'Anisonomy', and Justice: A Review of Madness and the Criminal Law*, 82 MICH. L. REV. 1093, 1093–1112 (1984) (book review).

¹³⁶ Hofer & Allenbaugh, *supra* note 20, at 24 (citing, for example, Minnesota's and Pennsylvania's sentencing guidelines).

¹³⁷ The Minnesota Sentencing Guidelines have adopted LR. See Frase, *supra* note 21, at 24 ("The Minnesota Sentencing Guidelines, in effect since 1980, provide a particularly strong example of a successful guidelines-based LR system in operation."); Richard S. Frase, *Sentencing Reform in Minnesota, Ten Years After: Reflections on Dale G. Parent's Structuring Criminal Sentences: The Evolution of Minnesota's Sentencing Guidelines*, 75 MINN. L. REV. 727, 744–45 (1991) (book review) (same). "Minnesota's pioneering sentencing reform has now been emulated in almost twenty states . . ." Richard S. Frase, *Sentencing Principles in Theory and Practice* 22 CRIME & JUST. 363, 430 (1997) (citations omitted); see also AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, SENTENCING xxi–xxii (3d ed., Chicago: ABA Press, 1994) ("This model [Minnesota] has dominated recent sentencing reform at the state level."); MORRIS & TONRY, *supra* note 13, at 49 ("Many states have now followed in Minnesota's footsteps."). Since Minnesota's sentencing guidelines have adopted LR, and almost twenty states have emulated Minnesota's example, therefore as many as twenty states have adopted LR as the underlying philosophy of their sentencing guidelines.

¹³⁸ Hofer & Allenbaugh, *supra* note 20, at 24 (concluding that "the vast majority of the federal sentencing guidelines clearly implement a philosophy of punishment commonly called 'modified just desert'"). For a discussion of the equivalence of the modified just desert approach and LR, see *supra* note 20.

¹³⁹ Frase, *supra* note 21, at 21 ("Most other Western countries, including those in the civil law as well as common law legal families, also employ . . . a loose version of LR.").

¹⁴⁰ See THE AMERICAN LAW INSTITUTE, *supra* note 22. The proposed revision, in relevant part, is as follows:

Revised Section 1.02(2). Purposes; Principles of Construction.

(2) The general purposes of the provisions governing sentencing and corrections . . . are:

(a) in decisions affecting the sentencing and correction of individual offenders:

While retributivism, or “defining retributivism,”¹⁴¹ seeks to precisely determine—no more and no less than what an offender deserves—the appropriate punishment,¹⁴² LR finds greater latitude in what constitutes a deserved and proportional punishment. Drawing on the imprecision of retributivism in fixing precisely an offender’s deserved, proportional punishment,¹⁴³ under LR the retributivist concerns of proportionality and desert determine the lower and upper limits of a *range* of what shall constitute a permissible punishment.¹⁴⁴ For example, with respect to our hypothetical offender whose proportional, deserved punishment was

(i) to render punishment within a range of severity sufficient but not excessive to reflect the gravity of offenses and the blameworthiness of offenders;

(ii) . . . to serve goals of offender rehabilitation, general deterrence, incapacitation of dangerous offenders, and restoration of crime victims and communities, provided that these goals are pursued within the boundaries of sentence severity permitted in subsection (a)(i) . . .

THE AMERICAN LAW INSTITUTE, *supra* note 22, at 129 (app. A).

¹⁴¹ MORRIS, CRIMINAL LAW, *supra* note 4, at 161 (by contrast with LR setting a range of deserved punishment for a given offense, retributivism or defining retributivism determines a precise punishment (no more and no less) for a given offense).

¹⁴² See *supra* note 13.

¹⁴³ See THE AMERICAN LAW INSTITUTE, *supra* note 22, at 37 (“One key insight in Morris’s LR theory is that a retributive evaluation of how much punishment is deserved in a given case can seldom be made with precision.”); MORRIS & TONRY, *supra* note 13:

Desert considerations do not, and cannot, define the specific punishment warranted . . . but they can give guidance as to limits. The concept of ‘just desert’ sets the maximum and minimum of the sentence . . . ; it does not give any more fine-tuning to the appropriate sentence than that. Nor should it.

Id. at 104–05; MORRIS, CRIMINAL LAW, *supra* note 4, at 148–49 (“It is rarely possible to say with precision, ‘that is the deserved punishment.’ All one can properly say, I submit, is ‘that is not an undeserved punishment.’ Desert defines a range of punishments.”) (citation omitted); MORRIS, *supra* note 24, at 75 (“Desert is, of course, not precisely quantifiable.”).

¹⁴⁴ See THE AMERICAN LAW INSTITUTE, *supra* note 22, at 40 (“Retribution works as a boundary at both extremes of lenity and severity.”); MORRIS & TONRY, *supra* note 13, at 105 (“The concept of ‘just desert’ sets the maximum and minimum of the sentence that may be imposed for any offense”); MORRIS, CRIMINAL LAW, *supra* note 4, at 149, 199 (same); Stephen J. Morse, *Justice, Mercy, and Crazyiness*, 36 STAN. L. REV. 1485, 1497 (1984) (book review) (“[D]esert sets an upper maximum (beyond which punishment is too severe) and a lower minimum (beneath which punishment is too lenient, thus depreciating the seriousness of the offense.”); see also *supra* note 24. Under the proposed Model Penal Code Sentencing provisions, the requirement of determining the punishment for a given offense as within a range of deserved, proportional punishment is embodied in Revised Section 1.02(2)(a)(i). See *supra* note 140.

stipulated to be (no less than) twenty-years imprisonment, LR would declare a range of, for example, from twenty to twenty-two (or from twenty to twenty-five) years of imprisonment as the deserved, proportional punishment. Only within that range of deserved, proportional punishment may consequentialist concerns of incapacitation, deterrence, and rehabilitation inform whether an offender receives a punishment closer to (but still within) the lower or upper limit.¹⁴⁵

A comparison of LR with the other principal theories of punishment may be helpful. Like retributivism, negative retributivism, and Hart's mixed theory, but unlike consequentialism, LR sets an upper limit or maximum on the amount of punishment based on the retributivist principles of desert and proportionality.¹⁴⁶ In contrast, consequentialism sets the upper limit based on consequentialist principles. Like retributivism, but unlike negative retributivism, Hart's mixed theory, and consequentialism, LR sets a lower limit or minimum based on the retributivist principles of proportionality and desert. In contrast, consequentialism and Hart's mixed theory set the lower limit or minimum based on consequentialist considerations; negative retributivism sets no lower limit or minimum at all. And like Hart's theory, but unlike retributivism, negative retributivism, and consequentialism, LR combines both retributive and consequential considerations. The key difference between Hart's theory and LR, however, is that Hart's theory sets the lower limit or minimum based on consequential considerations, and LR bases it on retributive considerations.

But while Hart's mixed theory can justify inflicting a constituent part of

¹⁴⁵ See THE AMERICAN LAW INSTITUTE, *supra* note 22, at 39 ("Within the permissible range of severity, LR provides that the utilitarian purposes of punishment may be weighed."); MORRIS & TONRY, *supra* note 13, at 107–08 (explaining that within the range of permissible deserved punishment, the precise punishment is "then fine-tuned by ideas of social protection, economizing with scarce punishment resources and the minimization of suffering . . ."); Morse, *supra* note 144, at 1491 ("Within that range, consequentialist concerns will appropriately dictate the punishment in a particular case."); see also *supra* note 25. Under the proposed revisions of the Model Penal Code Sentencing provisions, that consequentialist considerations may determine the degree of punishment within the range of permissible punishment is embodied in Revised Section 1.02(2)(a)(ii). See *supra* note 140. The Report emphasizes that consequentialist concerns can never warrant a punishment outside the range of proportional punishment: "In no circumstances, however, may the court choose a penalty that would be clearly insufficient on desert grounds to respond to the seriousness of the offense and the blameworthiness of the offender." THE AMERICAN LAW INSTITUTE, *supra* note 22, at 40.

¹⁴⁶ In a sense, retributivism sets upper and lower limits on the amount of deserved punishment. But since retributivism justifies punishment that is no more and no less than what is deserved, the lower and upper limits under retributivism may be identical or quite close. See *supra* note 13 and accompanying text. In contrast, the range between LR's upper and lower limits may be broader.

a temporal term of imprisonment,¹⁴⁷ LR cannot. LR incurs the same problem as retributivism in attempting to justify the offender's five-years imprisonment thus far. The five-years imprisonment thus far is undeserved and disproportional by being outside the range of what LR would consider proportional and deserved (for example, from twenty to twenty-five years of imprisonment). While the consequentialist component of Hart's mixed theory facilitates justifying the five-years imprisonment thus far,¹⁴⁸ the consequentialist component of LR is inapplicable because it only operates within the range of what is deserved and proportional.¹⁴⁹ The five-years imprisonment thus far is outside that range and thus undeserved and disproportional. Since it is first necessary to inflict the five-years imprisonment in order to inflict the twenty to twenty-two (or twenty to twenty-five) years of imprisonment, the inability to justify the five-years thus far of imprisonment precludes LR's ability to justify the twenty to twenty-two (or twenty to twenty-five) years of imprisonment.

That LR fails to justify temporal terms of imprisonment broadens the scope of the problem as a theoretical matter. Not only retributivism, but any theory or scheme of punishment setting the lower limit of punishment¹⁵⁰ for a given offense solely by the retributivist principles of proportionality and desert is unable to justify any temporal term of imprisonment for any offender.¹⁵¹ This is because the very early stages of a temporal term of imprisonment will necessarily be less than, and fall outside of, the minimum or lower limit of deserved punishment.

LR's inability to justify temporal terms of imprisonment also broadens the scope of the problem as a practical matter. While few (if any) sentencing codes are purely retributivist, LR is the consensus model of actual sentencing codes and guidelines. As a result, to the extent that state and federal

¹⁴⁷ See *supra* Part II.B.2.

¹⁴⁸ See *supra* Part II.B.2.

¹⁴⁹ See *supra* note 145 and accompanying text.

¹⁵⁰ This is assuming that the lower limit is greater than zero time in prison.

¹⁵¹ Of the theories of punishment considered in this Article, only retributivism and limiting retributivism set a lower limit of punishment by the principles of proportionality and desert. In contrast, consequentialism and Hart's mixed theory set the lower limit by consequentialist concerns. As a result, while the latter two theories can justify temporal terms of imprisonment, the former two theories cannot.

While negative retributivism sets the upper limit by the principles of desert and proportionality, it sets no lower limit whatsoever. Although negative retributivism avoids the specific problem besetting retributivism and LR as outlined in this Article, negative retributivism also cannot justify temporal terms of imprisonment but for a different reason. By setting no lower limit at all, negative retributivism fails to supply an affirmative justification for any punishment of any type whatsoever. For further discussion of this difficulty of negative retributivism as a stand-alone theory of punishment, see *supra* Part II.B.3.

sentencing guidelines do incorporate LR, those sentencing guidelines and codes also fail to justify any temporal term of imprisonment for any offender. In addition, the inability of LR to justify the most important and prevalent type of punishment for serious offenses—temporal terms of imprisonment—should give the American Law Institute pause in adopting LR as the basis for revising the Model Penal Code Sentencing provisions.

B. *Mandatory Minimums*

Retributivism's and LR's inability to justify inflicting temporal terms of imprisonment may also provide support for eliminating the much-maligned "mandatory minimums."¹⁵² Statutory or guidelines-based mandatory minimum sentences require a sentencing judge to impose a sentence not less than the stipulated minimum temporal term of imprisonment.¹⁵³ These mandatory minimums have been criticized often for hindering a judge's discretion in imposing a lesser sentence where warranted.¹⁵⁴ They have also been criticized for leading to draconian punishments, and the dramatic over-incarceration of America's citizens.¹⁵⁵ In the keynote speech to the American Bar Association Annual Meeting in August 2003, Justice Anthony Kennedy lamented "the inadequacies—and the injustices—in our prison and correctional systems."¹⁵⁶ After referencing the scope of our correctional apparatus—2.1 million imprisoned, an incarceration rate of seven times that of European countries, the disparate impact on African-Americans, and the economic cost of over forty billion dollars¹⁵⁷—Justice Kennedy concluded

¹⁵² See *supra* note 26.

¹⁵³ For an example, see *supra* note 27 and accompanying text.

¹⁵⁴ See, e.g., *Criticizing Sentencing Rules, U.S. Judge Resigns*, N.Y. TIMES, Sept. 30, 1990, at 22 (reporting federal district court Judge J. Lawrence Irving's resignation in protest over the harshness of mandatory minimum sentencing).

¹⁵⁵ See, e.g., Lowenthal, *supra* note 26, at 65, 121 (noting harmful effects of the overly harsh mandatory minimums); *id.* at 72 ("Not surprisingly, prison populations have increased dramatically since the proliferation of mandatory punishment laws. . . . [M]andatory punishment provisions must be counted as major contributor for several reasons."); see also, *supra* notes 26–27, and *infra* notes 156–163, and accompanying text.

¹⁵⁶ Kennedy, *supra* note 28, at 2.

¹⁵⁷ Justice Kennedy noted the "remarkable scale," of our nation's prison system:

The nationwide inmate population today is 2.1 million people. In California, even as we meet, this State alone keeps over 160,000 persons behind bars. In countries such as England, Italy, France, and Germany, the incarceration rate is about 1 in 1,000 persons. In the United States it is about 1 in 143.

We must confront another reality. Nationwide, more than 40% of the prison population consists of African-American inmates. About 10% of African-American men in their mid-to-late 20s are behind bars. In some cities more than 50% of young

that “our punishments [are] too severe, our sentences too long.”¹⁵⁸ Justice Kennedy identified mandatory minimum sentences as the principal culprit: “I can accept neither the necessity nor the wisdom of federal mandatory minimum sentences. In too many cases, mandatory minimum sentences are unwise and unjust.”¹⁵⁹ Justice Kennedy then implored the American Bar Association to recommend to Congress, “Please, Senators and Representatives, repeal federal mandatory minimums.”¹⁶⁰ In a public address the following month, Justice Stephen Breyer also spoke out against mandatory minimums as “set[ting] back the cause of fairness in sentencing.”¹⁶¹ He added that Justice Kennedy, Chief Justice William Rehnquist and “others on our Court” also disapproved of mandatory minimums.¹⁶² In addition to these Supreme Court justices, twelve of the federal courts of appeals have issued statements criticizing mandatory minimums.¹⁶³

While the promulgation of mandatory minimums was officially based on a number of punishment goals, retributivism is perceived to be the primary motivation.¹⁶⁴ The U.S. Sentencing Commission reported to Congress that “the most commonly-voiced goal of mandatory minimum penalties” is a retributivist/just deserts approach.¹⁶⁵ A number of commentators have also identified retributivism as the principal impetus for mandatory minimums.¹⁶⁶

African-American men are under the supervision of the criminal justice system.

While economic costs, defined in simple dollar terms, are secondary to human costs, they do illustrate the scale of the criminal justice system. The cost of housing, feeding, and caring for the inmate population in the United States is over 40 billion dollars per year. In the State of California alone, the cost of maintaining each inmate in the correctional system is about \$26,000 per year. And despite the high expenditures in prison, there remain urgent, unmet needs in the prison system.

Id.

¹⁵⁸ *Id.* at 3.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 4.

¹⁶¹ Breyer, *supra* note 28, at 11.

¹⁶² *Id.* at 10–11.

¹⁶³ See *supra* note 30 and accompanying text.

¹⁶⁴ See *supra* notes 31–33 and accompanying text, and *infra* notes 165–173 and accompanying text.

¹⁶⁵ U.S. SENTENCING COMMISSION, *supra* note 26, at 13.

¹⁶⁶ See, e.g., PAMALA L. GRISET, DETERMINATE SENTENCING: THE PROMISE AND REALITY OF RETRIBUTIVE JUSTICE 3 (1991) (“The determinate sentencing proposals that gained prominence in the late 1960s and early 1970s were rooted in theories of retributive justice, disclaiming reliance on crime-control objectives.”); JAMES WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 49–59 (2003) (tracing the rise of harsh, mandatory sentences and determinate

Justice Kennedy himself offered as a possible explanation James Whitman's account, in his recent book *Harsh Justice*,¹⁶⁷ of the dovetailing of two political movements, each embracing a different version of retributivism.¹⁶⁸ According to Whitman, the liberal, secular, "gentler"¹⁶⁹ retributivism movement advocated a formal egalitarianism that would expunge the

sentencing on a particularly tough version of retributivism); David Dolinko, *The Future of Punishment*, 46 UCLA L. REV. 1719, 1720, 1722 (1999) (linking the rise of retributivism with "the spread of mandatory minimum sentencing laws"); Dolinko, *supra* note 80, at 538 ("This born-again retributivism has had a substantial impact on the criminal justice system, for example by fueling the recent trend toward determinate sentencing."); Robert L. Misner, *A Strategy for Mercy*, 41 WM. & MARY L. REV. 1303, 1303-04 (2000) (correlating the public's shift toward retributivism with the adoption of mandatory minimum sentencing); Edward Rubin, *Just Say No to Retribution*, BUFF. CRIM. L. REV., (forthcoming 2004), (noting that retributivism's influence has led to mandatory minimum sentencing), available at <http://papers.ssrn.com/abstract=413660> (last visited Feb. 27, 2004); Jonathan Simon, *On Their Own: Delinquency Without Society*, 47 U. KAN. L. REV. 1001, 1002 (1999) ("[P]unishments have become more severe and are being allocated in modes evocative of retributive justice, illustrated by the greater use of guidelines, mandatory minimums, and determinate sentences.") (citations omitted); Jane L. Froyd, Comment, *Safety Valve Failure: Low-Level Drug Offenders and the Federal Sentencing Guidelines*, 94 NW. U. L. REV. 1471, 1488 (2000) ("This goal of retribution or 'just deserts' was the most commonly voiced reason for instituting mandatory minimum penalties.") (citation omitted); Karen Lutjen, Note, *Culpability and Sentencing Under Mandatory Minimums and the Federal Sentencing Guidelines: The Punishment No Longer Fits the Criminal*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 389, 394 (1996) ("A combination of retributive and retaliatory philosophies fathered the outburst of mandatory minimum statutes."). *But see* Donald P. Lay, *Rethinking the Guidelines: A Call for Cooperation*, 101 YALE L.J. 1755, 1756 (1992) (referring to the Congressional enactment of mandatory minimums as "politically expedient"); Lowenthal, *supra* note 26, at 67 ("The principal rationales of mandatory sentencing laws are utilitarian.") (citation omitted); Marc Miller, *Purposes at Sentencing*, 66 S. CAL. L. REV. 434, 434 (1992) ("In short, mandatory sentences involve politics, not purposes [of punishment].").

¹⁶⁷ See generally WHITMAN, *supra* note 166.

¹⁶⁸ In criticizing the severity and cost of mandatory minimum sentences, Justice Kennedy offers the following possible explanation for their adoption:

Professor James Whitman considers some of these matters in his recent book *Harsh Justice*. He argues that one explanation for severe sentences is the coalescence of two views coming from different parts of the political spectrum. One view warns against being soft on crime; the other urges a rigid, egalitarian approach to sentence uniformity.

Kennedy, *supra* note 28, at 3-4.

¹⁶⁹ WHITMAN, *supra* note 166, at 194 (chronicling that as the harsher brand of retributivism was taking root in the mid-1970s, "the academic philosophers who advocated retributivism at the same time may have hoped to encourage a kind of gentler Kantianism [retributivism]").

excessive disparity, often racial, from sentencing practice with the hope of milder punishment.¹⁷⁰ The conservative, Christian-based, law-and-order, even “fascist,”¹⁷¹ harsh retributivism movement also seeks to reduce sentencing disparity, but with a view toward more severe punishments.¹⁷² Thus, under the banner of retributivism, both groups, Justice Kennedy concluded, “agree on mandatory minimum sentences.”¹⁷³

That any scheme of punishment setting a minimum amount of punishment for a given offense based on retributivist principles of desert fails to justify temporal terms of imprisonment supplies a conceptual framework for eliminating mandatory minimums. The early stages of any mandatory minimum temporal term of imprisonment will necessarily be undeserved, disproportional, and thus unjustified under retributivism and LR. Even though mandatory minimums might be justified by other theories of punishment, the inability of retributivism and LR to justify mandatory minimums considerably weakens their theoretical support. Moreover, to the extent that retributivism is popularly perceived to be the primary motivation for mandatory minimums, the argument of this Article erodes that basis for popular support. While maximum, or upper limits on, temporal terms of imprisonment may be justified by retributivist principles, mandatory minimums cannot. Ironically, although mandatory minimums are widely assailed as excessively harsh, the argument of this Article demonstrates that they are unjustified under retributivism because of their infliction of undeservedly and disproportionately *lenient* punishment.

VI. CONCLUSION

The implicit and unanalyzed assumption in punishment theory—if a whole punishment is justified, then a constituent part of that whole punishment necessarily also must be justified—is false with respect to retributivism. The assumption is also false with respect to any theory or scheme of punishment that sets the lower limit of the degree of punishment for a given offense based on the retributivist principles of proportionality and desert. While the falsity of this assumption for such accounts of punishment

¹⁷⁰ *Id.* at 53–54, 194.

¹⁷¹ *Id.* at 202–03 (describing “the resemblance between the criminal justice of the United States today and the criminal justice of the fascists, and in particular of the Nazis”). Whitman bases the resemblance largely on the “‘primitive’ retributivism” both share. *Id.* at 202.

¹⁷² *Id.* at 53–54. According to Whitman, “contemporary America[‘s] . . . spectacularly harsh and degrading brand of retributivism,” *id.* at 24, arose in the mid-1970s and “is closely associated both with populist justice and with deep-seated Christian sentiment.” *Id.* at 194.

¹⁷³ Kennedy, *supra* note 28, at 4.

perhaps does not undermine their justification for all types of punishments, it does undermine their ability to justify any divisible punishment, for example, temporal terms of imprisonment. If the (lower limit of a) proportional and deserved punishment for an offender's crime is X time in prison, then punishment of part of X will necessarily be disproportional, undeserved, and unjustified. Since X cannot be inflicted without first inflicting a part of X , the inability to justify a part of X precludes the ability to justify X as well. As a result, such theories or schemes of punishment are unable to justify the infliction of *any* temporal term of imprisonment for *any* offender or offense.

This problem is not merely of theoretical concern. Limiting retributivism (LR), a mixed or hybrid approach to punishment that incorporates both retributivist and consequentialist principles, is also unable to justify temporal terms of imprisonment. Hailed as the consensus model of sentencing, LR is the underlying approach in state and federal sentencing guidelines and codes as well as the newly proposed revisions of the Model Penal Code Sentencing provisions. By fixing a minimum amount of punishment for a given offense by the retributivist principles of proportionality and desert, sentencing guidelines and codes adopting LR fail to justify the infliction of temporal terms of imprisonment. In addition, to the extent that the much criticized mandatory minimum sentencing laws are supported by retributivism or LR, this Article provides the conceptual framework supporting their elimination.

Neither the leading theoretical account of punishment nor the consensus approach utilized in sentencing codes and guidelines is able to justify the most important mode of punishment for serious offenses—temporal terms of imprisonment. Without a solution to this difficulty, consequentialist considerations must inform the determination of any lower limit of the degree of punishment for any given offense. Although this stricture forecloses the viability of a purely retributivist approach, it does not bar retributivist principles altogether. Retributivist considerations may be incorporated, but only in setting the maximum or upper limit of the degree of punishment. Of the theories of punishment canvassed here, with respect to justifying temporal terms of imprisonment, either consequentialism or a mixed approach (that sets the lower limit of punishment by consequentialist principles and the upper limit by either retributivist or consequentialist principles) must be adopted.